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LEGAL DUTIES
AND OTHER ESSAYS IN
JURISPRUDENCE

LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE

BY

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C. K. A.

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JURISPRUDENCE—WHAT AND WHY?¹

BENTHAM once described jurisprudence as 'the art of being methodically ignorant of what everybody knows'. The gibe loses some of its acidity when we remember that it is perhaps better to be methodically ignorant than to be unmethodically learned. What puzzles one in the epigram is the confident assumption of 'what everybody knows'; for if, as Bentham avers, everybody knows what jurisprudence is *about*, nobody seems to know exactly what it *is*.

Some of the most famous descriptions of it seem to state either too little or too much. When, for example, Ulpian, and Justinian after him, tell us that it is 'the observation of things human and divine, the knowledge of the just and the unjust', we feel that the definition might equally well apply to religion or philosophy. And some comparatively modern definitions seem to be hardly less vague—for example, that of Sheldon Amos: 'The Science of Jurisprudence may be said, broadly, to deal with the necessary and formal facts expressed in the very structure of civil society, as that structure is modified and controlled by the facts of civil government and of the constitution of human nature and of the physical universe.'² 'The very term 'jurisprudence', as denoting a separate branch of study, is not very ancient in our law. Austin was the first scholar who attempted to prescribe an exact scope for it; and it is a little discouraging to find that, though he devotes much effort to determining its province, he never throughout the whole of his voluminous work attempts to define it, except by telling us what it is *not*—and chiefly he tells us that it is *not* moral philosophy.

It is impossible, and it would be unprofitable, to collate the many experimental definitions of jurisprudence.³

¹ *Juridical Review*, Dec., 1930.

² *Science of Jurisprudence*, 1.

³ An instructive symposium of various definitions is made by Dean Roscoe Pound, *Jurisprudence Outline* (4th ed.), 19.

Broadly speaking, they suggest three distinct conceptions of jurisprudence—as a science, as a philosophy, and as a method.

In 1880 Sir Thomas Erskine Holland offered the first English definition which at least had the merit of being succinct. His six-word formula is well known: 'The formal science of positive law.'

It is the weakness of all definitions that they substitute one conception for another, and the substitute often needs as much definition as that for which it is substituted. The explanation has to be explained. Holland's compact definition is not altogether free from the common infirmity of its kind. What, we immediately ask, is a formal science? The author explains—what is certainly not self-explanatory—that by the term 'formal' he means that jurisprudence concerns the human *relations* which are governed by rules of law rather than the material *rules* themselves; for these latter are the subjects of legal exposition, criticism, or compilation rather than of jurisprudence.

Inevitably, we next inquire what is meant by 'positive' law? Holland employs the word in the same sense as Austin. It is actual, existing law, as distinguished from hypothetical, ideal law. Therefore Holland insists at the outset—and remains faithful to his principle—that jurisprudence must work *a posteriori* and not *a priori*.

This is consistent with—and indeed dictated by—the conception of jurisprudence as a science rather than as a philosophy. Can there be a science of law in any intelligible sense of the word 'science'?

A science is a system of knowledge. The mere accumulation of knowledge is valueless by itself, except, of course, as a kind of manual labour which may provide the material for constructive intelligence. There is no greater ignorance than the man who knows everything and understands nothing—and such persons abound. Information is barren until it is brought systematically into relationship with some part of the general meaning of existence. The object of a science is 'to reach the highest point of a generaliza-

tion founded upon acquaintance with phenomena, consequently upon that relative knowledge which is the subject of the special sciences'.¹

Its method is inductive. It begins with the observation of separate things, events, phenomena, and, bringing them into a rational concatenation, arrives at some general principle which they exhibit. It is not creative: its material is beyond its own choice or control. It takes the 'things given' to it—its *data*—and tries to discover the animating principle within. Instead of deducing a principle of *ought* from an ideal which is assumed *ab ante*, it induces a principle of *is* from what is observed and correlated. If jurisprudence is inductive in this sense, or, as Holland puts it, *a posteriori*, clearly it is at once distinguished from morals.

It may therefore sound contradictory to say, as we are bound to say, that if it is a science at all, it is one of the moral sciences. It is needless to observe that the term 'moral' in this connexion is used in a conventional sense, which is opposed to the 'physical'. The physical sciences deal with things and forces of the macrocosm which is outside the microcosm—the 'little kingdom'—of man himself. Jurisprudence does not deal with the facts and forces of the physical universe, but with certain manifestations of man's reason and consciousness. It is systematized investigation, not of the manner in which man is affected by physical environment, but of the ways which he has devised for regulating his relationships in society.

Finally, science is general and it is uniform. There is no such thing as a science which is local. Locality may greatly affect the conditions in which science has to work, it may colour some parts of its data, but it cannot in itself affect a principle of knowledge. This is so self-evident that it would scarcely bear assertion were it not that it seems to be ignored in certain controversies as to the terminology of jurisprudence.

It is said that there cannot be any such thing as a general science of law which holds good, as a system of

¹ Korkunov, *General Theory of Law*, 5.

knowledge, with any real uniformity and universality. This contention has been derived from the results of modern historical jurisprudence. If that movement has taught us anything, it has put us on our guard against incautious generalizations concerning the universality and the permanence of legal institutions. The more we examine different civilizations at different periods, the more bewildering are the discrepancies. 'Hardly a rule of to-day,' writes an eminent American judge, 'but may be matched by its opposite of yesterday.'¹ It is, of course, utterly impossible to generalize about details; but it is also impossible, we are told, to generalize even about first principles. The moment we have disengaged some principle of which we think to say, with a sigh of relief, 'Well, *that* at least is an indispensable element of all law', some patient investigator into the legal system of the Houyhnhnms in the mists of antiquity will discover a fragment of stone or pottery which disturbs all our conclusions. Among the Houyhnhnms, we learn, it was considered a gallant and meritorious thing, and was rewarded by the highest dignities of state, to rob one's neighbour and despoil his family. Or it may be that a traveller in Polynesia has heard from a missionary, who had it at fifth-hand from the King of Canoodledum, that in Canoodledum the most admired and powerful paterfamilias is he who can wrest the largest number of wives from his fellow-tribesmen. What, then, becomes of our most settled notions of property, of criminal law, of the family? Forget, if you will, even the nineteenth-century historical jurists—go back to Montesquieu. There is nothing that Montesquieu loved so much as the startling eccentricities, the whimsical aberrations, of different legal institutions. He collected them all his life and made a remarkable museum of them. As his very title informs us, he was preoccupied not with *l'esprit du droit* but with *l'esprit des lois*.

In short, it is argued that the lessons of history make it impossible to posit any *constants* of law. The eighteenth

¹ Cardozo, *The Nature of the Judicial Process*, Introd.

century fell into this error when it attempted (in accordance with a long tradition) to isolate *one* great constant of jurisprudence—natural law. Nowadays we have seen through that delusion, and we are warned at all costs to avoid relapsing into it or anything like it.

Hence it is contended that the most to which jurisprudence can aspire is to confine itself to the legal system of one community at one time—no doubt drawing illustrations and analogies, when they are useful, from other systems and other times, but directing its main effort to the analysis and exposition of the principles of a single system. This is called 'particular' jurisprudence.

These terms, 'particular' and 'general' jurisprudence, are used in a somewhat embarrassing variety of senses. Austin meant by 'general' jurisprudence 'the philosophy of positive law'—the phrase was borrowed from Hugo—i.e. law as it actually *is*, not as it ought to be.

'It is concerned directly with principles and distinctions which are common to various systems of particular and positive law; and which each of those various systems inevitably involves, let it be worthy of praise or blame, or let it accord or not with an assumed measure or test.'¹

Particular jurisprudence, on the other hand, is

'the science of any such system of positive law as now actually obtains, or once actually obtained, in a specifically determined nation, or specifically determined nations.'²

From this it would appear that general jurisprudence is the true science of jurisprudence, while particular jurisprudence is merely a part of, or contribution to, it.

Some recent English writers, notably Salmond and Jethro Brown, wholly repudiate 'general' jurisprudence as Austin thus explains it. They seem to concur in his conception of 'particular' jurisprudence, but, unlike him, they insist that it is the *only* kind of jurisprudence properly so called. Salmond protests against attributing to juris-

¹ *Lectures* (Campbell's ed.), i. 33.

² *Ibid.*, i. 32.

prudence any quality whatever of generality, or perhaps we should say of universality.

'But it is not because of universal reception that any principles pertain to the theory or philosophy of law. For this purpose such reception is neither sufficient nor necessary. Even if no system in the world save that of England recognized the legislative efficacy of judicial precedents, the theory of case-law would none the less be a fit and proper subject of general jurisprudence. *Jurisprudentia generalis* is not the study of legal systems in general, but the study of general or fundamental principles of a particular legal system.'¹

But surely there is misrepresentation here. Nobody has ever suggested that general jurisprudence is merely a conglomeration of those *particular* legal rules and forms which happen to be universally observed. What is in question is the general body or system of principle which resides in law as a phenomenon of human social life. To take Salmond's example, one part of that general body or system—and we can with some confidence call it a universal or indispensable part—is judicial interpretation and application of rules. English case-law is one form, and a very important form, of that part of law. It must therefore certainly be studied as an element of general jurisprudence. The more we know of different manifestations of this aspect of law, the better we shall understand its true nature *in itself*. Would Salmond suggest that by studying the English system of case-law we have grasped the whole principle of judicial interpretation? No system of jurisprudence, I apprehend, could afford to ignore the doctrine, very different from the English theory of precedent, which prevails so widely elsewhere. Particular systems must be studied because they contribute to the general sum of juristic knowledge; and it is for that reason that lawyers all the world over become daily more conscious of the usefulness of comparative legal methods.

Holland,² consistently with his own definition, entirely rejects the distinction between 'particular' and 'general'

¹ *Jurisprudence*, 4 n.

² *Jurisprudence*, (14th ed.) 10.

jurisprudence. If, he says, jurisprudence is rightly called a science, then, like all sciences, it must be 'general', and it is meaningless to call it 'particular'. Geology is the science of the earth's composition and structure; it would be a strange use of language to call the study of the composition and structure of England the science of geology. The term 'particular' jurisprudence, continues Holland, 'may, and probably does, mean: an acquaintance with the laws of a particular people', which is 'merely empirical and practical knowledge'.

It seems impossible to escape from the logic of this contention. If jurisprudence is purely local, then it cannot be a science. But perhaps this means only that it is improperly called a science? That position is maintainable, but what then are we to call it? A philosophy? But a local philosophy is as meaningless as a local science. The view of particular jurisprudence urged by Salmond inevitably reduces jurisprudence purely to a matter of method—a system of legal exegetics; and the objections to that view must presently be mentioned.

A more pragmatic objection is made to the notion of general jurisprudence. If I understand him aright, it is the basis of Jethro Brown's discussion of this topic.¹ If jurisprudence is a science, it is urged, its material is universal in an unlimited sense. It should comprise the principles of the laws of all peoples at all times. There is no middle way between the jurisprudence of a particular civilization and the jurisprudence of the entire world throughout its whole history. It is manifestly impracticable for any scheme of jurisprudence to be as comprehensive as this, and that fact is itself sufficient to reduce 'general' jurisprudence to fantasy.

It is difficult to see that this objection, so vigorously and often so satirically pressed, is more appropriate to jurisprudence than to any other science. The data of all sciences are historically and geographically imperfect. There is not one of them—I do not now speak of the

¹ *The Austinian Theory of Law*, Excursus F.

numerous pseudo-sciences—which pretends that it has, or is likely to have, all the possible evidence at its command. If it had, scientific study might cease once for all. Every day new evidence is indefatigably sought, diligently examined, and not seldom interpreted in a way which compels us to revise many of our settled ideas. There are sciences of which we are accustomed to say that they are 'in their infancy'; and indeed, if we take the long view, all sciences are in their infancy. Perhaps jurisprudence has not progressed very far beyond the stage of childhood—let us hope first, not second, childhood. The data of jurisprudence which now accumulate so rapidly are not so very much more meagre than those of other sciences. Jurists are nowadays conceiving the scope of their task with a largeness, not to say a grandiosity, which is a little daunting to those whose utmost ambition is to pick up a pebble or two on the shore of truth. A 'universal jurisprudence' may have been a chimera when Leibnitz dreamed of it (only to abandon it), but to-day German scholars do not hesitate to compose encyclopaedias of comparative law which, if they do not achieve the whole of their authors' aspirations, at least place the larger claims of general jurisprudence beyond the realm of the merely visionary.

And indeed the objection might be urged with nearly as much justice against 'particular' as against 'general' jurisprudence. For even the results of a jurisprudence which confines itself rigidly to a single system will also, quite certainly, be defective in some respects. One has never seen the unexceptionable and the all-comprehensive work of particular jurisprudence, and one does not expect to see it. The data of the science of law within any community are incomplete. At this moment the data of our law of torts have not been fully explored and are highly incomplete in some capital respects. The conclusions of jurisprudence, general or particular, are approximate only, because the conclusions of all science are approximate only; and indeed truth is approximate only. 'Eternal verities' must be left to theologians, who alone among

mankind enjoy the singular privilege of having once for all fished up the whole truth from the bottom of the well where it lies: such is not the happy position of scientists, especially since the coming of Einstein. When, therefore, Holland rightly calls jurisprudence a 'progressive' science—for which he has been sharply criticized by Professor Buckland¹—he has really added nothing to the description of it as a science: for all sciences are progressive, or they are nothing.

But we have still left unanswered the criticism which is derived from history. Does it not remain true that the variations, in gross and in detail, between different systems of law, in different environments and at different times, are so great and so incalculable that it is both impracticable and unscientific to attempt any general theory of legal principles?

This view may be exaggerated. There are certain elements which are inherent in the very conception of law, considered as a phenomenon of social life, whatever the disparities may be in detail. For example, there are certain necessities inherent in the very fact that life *is* social which assign to law some of its most characteristic functions—the preservation of order, the dispensation of justice, the delimitation of rights. Everywhere there are, or have been, habits of conduct, arising partly from social exigencies, partly from man's imitative faculty, which generate law in the form of customary observances. Again, if there is law at all, there must be, somewhere in the community, an ultimate power which will enforce it. There must be *persons* who are subject to law, and *things* which are objects of it. There must be certain fundamental relationships, such as ownership and possession, between these persons and these things. The very existence of law creates rights, and the very existence of rights creates duties; some prefer to put the proposition the other way round, holding that law primarily creates duties, and that rights fall into the second place, if they fall into any place at all; but which—

¹ 'Difficulties of Abstract Jurisprudence', *L.Q.R.* vi. 436.

ever way we put it, it seems clear that law without a content of rights or duties, or both, is meaningless. Equally meaningless is a law which does not exist in order to be applied to actual conflicts of claims; and thus in any legal system we are faced, inescapably, with the whole great field of the judicial function and the problems of interpretation. And finally, if law exists in order to regulate actual relationships, its regulation must be effectual: it is not law at all unless somehow and somewhere it is enforceable: and therefore, whatever *milieu* we choose for our jurisprudence, we shall have to deal with the consequences which follow breaches of the law—liability, execution, punishment.

This catalogue does not pretend to be exhaustive: nothing has been said, for example, of procedure, or what is called adjective law: here, perhaps, the formulation of general principles is least practicable and profitable, for the variations are largely those of form rather than of substance, and are often extremely arbitrary. Yet even here it would be rash to say that jurisprudence may not arrive at certain principles of general import. The passage, for example, such as we find it in Roman Law, from sacramental forms of self-help to state-arbitrament; and indeed, the passage, in general, from formal procedure to the substantive law which, as Maine said, is secreted in its interstices—these are topics which no intelligent system of jurisprudence can afford to neglect. Even matters of procedure touch, ultimately, the fundamental rights which are peculiarly the concern of jurisprudence.

May we not say, without unscientific generalization and without under-estimating the lessons of history, that these elements of law which I have imperfectly summarized are the real subject-matter of jurisprudence, from whatever angle we approach it? If we take up any work of jurisprudence, in any language, we shall find that, whatever the superstructure, the foundation consists of these principles, or some of them.

It does not at all follow that 'particular' jurisprudence is valueless. On the contrary, the study of particular systems

is an indispensable contribution to jurisprudence. More, it is the only method by which jurisprudence can work. We may at once admit that particular jurisprudence is the utmost to which the majority of us will be able to attain. Only exceptional minds can do more than concentrate upon one part of the data of a science, or add more than a small, but not on that account contemptible, quota to the sum of knowledge. Because it is difficult for any mind to comprehend the whole scope of jurisprudence, are we to say that jurisprudence is necessarily, in and of itself, a localized conception? If I may return to Holland's illustration of geology, I should imagine that there are few students of that science who would claim to have comprehended with uniform intimacy the whole world-wide scope of it; but we do not on that account consider it a whole congeries of sciences, all bearing (curiously enough) the same name, but all essentially different in different parts of the world; nor do we consider a student any the less a geologist because he devotes his main effort to the study of a particular region where he may discover principles of general value to his science.

If particular jurisprudence is only one form of contribution to the science of jurisprudence, so are those other kinds to which a variety of sharply differentiated labels have been attached. The range of these labels is limited only by the resources of vocabulary. If, for example, we turn to chapter xvii of Bentham's *Morals and Legislation*, we find that jurisprudence is classified according to the following distinctions (among others): expository and censorial; authoritative and unauthoritative; local and universal; ancient and living; statutory and customary; civil, penal, and criminal. If it tickles our ingenuity, we can go on with this kind of pastime for ever. And we can apply it not only to jurisprudence, but to any study or science at will. Such classification may be described as purely adjectival.

The very employment of adjectives demands some explanation of the substantive. On page 369 of Jethro

Brown's *Austinian Theory of Law* I find an ingenious chart which analyses law, 'regarded as the subject-matter of a Science', into four different kinds of jurisprudence—historical, comparative historical, comparative, and particular or national. 'General jurisprudence', by a remarkable logical inversion, is regarded only as an avenue to 'comparative jurisprudence'. Are we not entitled to say: 'These are methods of studying a subject—what is the subject itself? These are kinds of jurisprudence—what is jurisprudence?'

The kinds are, after all, only kinds. They are tributaries flowing into the one stream. The adjectives which are applied to them denote their method, not their essence. The cardinal error is to confuse the method with the essence and to consider any one kind as the only kind.

For example, *comparative* jurisprudence. Its mode of operation is only an extension of the method of so-called 'particular' jurisprudence. Whether different systems of the same era are being compared, or individual institutions, or different periods of development in the same or different systems, the aim is to obtain data which lead inductively to juristic principles. The method of all sciences must be 'comparative' when the evidence upon which they depend is scattered over a wide area. In few, if any, of them is the largest known area of observation yet coincident with the actual area. The term 'comparative' clearly denotes only the method of operation, not the end in view, for the process of comparison is employed not for its own sake, but in order to arrive at general conclusions.

The same is to be said of *historical* jurisprudence. When, in order to apprehend the nature, *in idea*, of any legal institution or system of institutions, it is necessary to determine the actual circumstances of development, then we must invoke the aid of history—and it is seldom that we are dispensed from this necessity. When our chief aim is to abstract the idea itself, rather than the actual matters of fact which surround it, then it is perhaps correct—at

least it is intelligible—to say that we are engaged in the study of historical jurisprudence rather than of legal history. Nevertheless, it may be doubted whether any rigid line ever has been or ever can be drawn between historical jurisprudence and legal history. The distinction does not seem to be made in any language other than English. Some years ago Sir Paul Vinogradoff published a work entitled *Historical Jurisprudence*. There is no equivalent in French: the French translation appears under the title *Principes historiques du Droit*. No doubt, according to one school of thought nowadays, history is the utterly impersonal documentation or cataloguing of bare facts. But facts can never be bare: they are always clothed with the personality of the observer. The record of them cannot, in the nature of the case, be entirely objective; and if it were so, it would be valueless. Legal history, as Maitland never tired of preaching, is the history of ideas. The legal historian cannot possibly avoid—even if he wants to, which he does not—examining the development of jurisprudential tendencies and principles. Nor, on the other hand, can the historical jurist avoid the examination of innumerable matters of fact if he wishes to arrive at sound theory. These two branches of legal learning, if they are scientifically distinguishable at all, differ only in degree, not in kind. Both contribute to the science of jurisprudence.

What precisely is meant by *analytical* jurisprudence it is not at all easy to gather from the many discussions of its nature. In itself, the term is misleading, for it suggests a type of jurisprudence which confines itself to pure analysis of legal rules. It is doubtful whether there has ever been, or ever can be, a jurisprudence of this kind. Certainly it is not the jurisprudence of those writers who are commonly grouped together as the 'Analytical School'. Nothing could be more remote from Bentham's aim than mere non-constructive analysis of the law. Nor can the method be attributed, without many qualifications, to Austin, nor to his whole-hearted modern followers like Markby, nor

to his more critical followers like Holland. The common characteristic of the 'school'—which is often, and rightly, understood to include Hobbes—is not a purely analytical method but a conception of law which may be conveniently called the Imperative Theory. It is noteworthy that none of the members of the group himself employed the term 'analytical' to describe his conception of the method of jurisprudence.¹ It was apparently invented by Maine in his references to Austin in lectures at the Inns of Court, and on the whole it was not a very happy invention.

By Salmond (whom I should hesitate to call a purely Austinian jurist) the term is used as the antithesis of *both* the ethical and the historical treatment of jurisprudence. 'The purpose of analytical jurisprudence is to analyse, without reference either to their historical origin or to their ethical significance or validity, the first principles of law.'² Salmond is the only writer known to me who thus peremptorily divorces jurisprudence and history. How it is possible to analyse or to understand the 'first principles of law' without reference to their historical origin it is difficult to see. Though in his definition of law and justice³ Salmond is not consistent with his own doctrine, in his separation of jurisprudence from ethics he seems to be on firmer ground. This also appears to be the substance of Holland's conception of jurisprudence as a 'formal' science; and of the same mind is Lord Bryce,⁴ who regards the analytical method as 'standing in a marked and sometimes scornful opposition to the metaphysical method'; it 'leaves metaphysics and ethics on one side, and starts from the concrete, that is to say, from the actual facts of law as it sees them to-day'. This also seems to be what people

¹ Austin devotes much space to the 'Analysis of Leading Conceptions' (as any jurist must do), but this is by no means the whole of his jurisprudence.

² *Op. cit.* 5.

³ 'Law consists of the rules recognized and applied by the courts in the exercise of their function of enforcing or maintaining right or justice by means of the physical force of the state', *op. cit.* 58. This makes justice (a moral notion) part of the definition of law.

⁴ *Studies in History and Jurisprudence*, ii. 612.

mean when they describe Austin's jurisprudence as 'analytical'. What is being insisted on—by an equivocal epithet, as it seems to me—is the examination of legal rules 'without reference to their goodness or badness'. Obviously this meaning of 'analytical' will not apply to Bentham; but it describes a vital point in Austin's jurisprudence, if we exclude (and it is a part of his work which is often forgotten) his long discussions of the law of nature and of the principle of utility.

Briefly, it means that jurisprudence is inductive and not deductive. And this leads us to ask whether laws *can* be considered 'without reference to their goodness or badness'. Is jurisprudence, in short, truly a science, or is it a philosophy?

It is clear that popularly the word 'philosophy' is often used as simply synonymous with 'knowledge', especially any ordered system of knowledge. In this sense, indeed, the word was technically used in the Middle Ages: 'natural philosophy' was what we should now call 'natural science'. To this day the chair of Natural Philosophy in the University of Oxford is a chair of Mathematics. In this sense of the word, not only jurisprudence, but all law, is philosophy. But nowadays it may be assumed that we mean by philosophy something less vague than this. Moral philosophy concerns itself with the principles of ultimate right and wrong in human conduct; its standard, interpreted through human conscience, must be an ultimate right and good. Metaphysical philosophy concerns itself with ultimate reality, *truth*. It has been described as 'a particular transcendental view both of the object of study and of the source of science'.¹ Its method is deductive. 'It employs neither observation nor induction. It continues to suppose that an explanation of eternal principles . . . can be given, not by the empirical method, but by way of metaphysics, with the aid of principles conceived immediately by our reason without the aid of experience.'² It lives in the realm of pure idea.

¹ Korkunov, *op. cit.* 23.

² *Ibid.* 29.

Perhaps the philosophical approach to jurisprudence can best be illustrated by quoting the words of one of the few Englishmen—if that term may, *pro hac vice*, include a Scot—who has written upon jurisprudence purely from the point of view of 'natural law'. In Lorimer's *Institutes* we read:¹

"The ultimate object of jurisprudence is the realization of the idea in the ideal of humanity, the attainment of human perfection, and this object is identical with the object of ethics . . .

"The proximate object of jurisprudence, the object which it seeks as a separate science (i.e. from ethics), is liberty. But liberty, being the perfect relation between human beings, becomes a means towards their realization of perfection as human beings. Hence jurisprudence, in realizing its special or proximate object, becomes a means towards the realization of the ultimate object which it has in common with ethics. The relation in which jurisprudence stands to ethics is thus a subordinate one, the relation of species to genus."

All this is good Kant. One has only to listen for a moment to these resounding periods to realize how profoundly this attitude differs from that which considers laws 'without reference to their goodness or badness'.

Is not the truth this, that what is so often called 'philosophical jurisprudence' would more properly be called 'the philosophy of jurisprudence'? Every form of human knowledge and activity is grist to the mill of philosophy. Since its aim is to arrive at ultimate verities, there is no form of rational phenomenon which it excludes from consideration. At all events, it would be singularly short-sighted if it neglected so important a social and rational phenomenon as law. But then, it may be said, is not this exactly what is meant when jurisprudence is described as a philosophy? Is not jurisprudence precisely 'the philosophy of law'? Not so. The business of jurisprudence is to arrive inductively at the essential principles of law. This is a sufficient task for any science, for essential principles of law do not lie on the surface; they can be discovered only by penetrating through a multitude of

¹ pp. 353, 355.

distracting appearances. Is not the business of philosophy (so far as it interests itself in law) to take the results of jurisprudence—for it can hardly itself attain those results by technical legal study—and relate them to general philosophical principles? This is really what the great works of 'philosophy of law', such as Kant's and Hegel's, seek to do. In short, so-called philosophical or metaphysical jurisprudence seems to be the philosophical contemplation of the conclusions of a particular branch of knowledge. This form of treatment is common enough in philosophy. Thus philosophers frequently treat of the 'philosophy of history'. It would be a confusing transference of ideas to call this 'philosophical history'. The philosopher does not attempt to gather for himself the data of history. Capacity and time being restricted, he accepts them from the authoritative exponents of history. His aim is to view, in relation to ultimate truths, the principles of action and circumstance which are discoverable, and have been discovered, in recorded history.

The line is slender. We ought not to regard jurisprudence and philosophy as mutually exclusive. They are closely interrelated. We should beware of saying at every turn, as some writers seem to do, 'Go to! this is not jurisprudence, it is philosophy'; just as we should beware of saying, whenever origins are discussed, 'Go to! this is not jurisprudence, it is history.' Nevertheless, the objects and methods—and the methods even more than the objects, for ultimately the object of all scientific knowledge is to enlarge truth—of these two branches of study are different. The philosophy of jurisprudence is not only a legitimate, it is an inevitable subject of study for the philosopher. And the jurist himself has much to learn from it. There have been periods when jurisprudence has stood very substantially indebted to metaphysical philosophy; always, at any period, it must stand indebted to moral philosophy. But it remains true that jurisprudence is scientific in aim and substance, that its method is inductive, and that, since legal institutions develop empirically, it has a sufficient

and an important task to perform without striving after the ultimate metaphysical verities (if any such there be). If that view is implied by the term 'analytical', then I suppose that the position here suggested is 'analytical'. I believe that the task of jurisprudence is to abstract and systematize the essential principles of law 'without reference to their goodness or badness'. I cannot by any means see why any intelligent person, when he has discharged that task to the best of his ability, should not proceed to criticize the goodness and badness of laws. But that criticism I should hardly call jurisprudence.

It may be in despair of determining any precise province for jurisprudence that some writers appear to deny it all substance whatever, and regard it simply as an affair of scheme. There was a time on the Continent—the movement began in France—when 'Encyclopaedia', as it is called, was not only a popular learned pursuit, but was erected to the dignity of a separate, self-contained science. It has now fallen upon evil days.

In this theory, jurisprudence consists simply in the arrangement or gathering together of a legal subject for purposes of exposition. J. C. Gray observes:¹ 'It is right to speak of the Jurisprudence of the Roman Catholic Church; and if the Worshipful Company of Bellows Menders has courts with judicial functions, it may have a jurisprudence.' In the view of the same writer,² 'the real relation of Jurisprudence to Law depends not upon *what* Law is treated, but *how* Law is treated'. All that is necessary to give a work the character of jurisprudence is that 'it should be an orderly, scientific treatise in which the subjects are duly classified and subordinated'. If we were to insert a second 'l' in Gray's word 'duly', we should come near to what is, I fear, a very prevalent impression of jurisprudence.

The arrangement of any subject is one of its most difficult problems. Nor is it a menial or mechanical task; for nobody can plot the exposition of a subject until he has

¹ *The Nature and Sources of the Law*, 134.

² *Ibid.*, 147.

seen it clearly and seen it whole. Immense benefit has been conferred on legal study by skilful arrangement. The value, for example, of the Abridgements has been and still is inestimable. A work like Halsbury's *Laws of England* is assuredly a treasure-house. Justinian's *Digest* would have been a much greater work if it had been better arranged; and the reclassification of it by commentators was the work of centuries and of almost unlimited research and ingenuity. That arrangement and classification present an extremely difficult problem in law is sufficiently shown by the fact that no two systems agree, even in great national codes.¹ But to conclude from these facts that jurisprudence is mere scheme seems like saying that a man's clothes are the man himself. They may, as Polonius has told us, 'proclaim the man', and no doubt scheme may proclaim the jurist; but they are not the man and they are not jurisprudence. Probably what is in the mind of a writer like J. C. Gray when he makes his surprising statement is that good arrangement necessarily involves good *perspective*, and a good perspective of a subject necessarily involves perception and grasp of its fundamental principles; and it is to this apprehension and exposition of *principle* that Gray really wishes to direct attention. Jurisprudence certainly must be, as he says, 'orderly and scientific', but the method adopted is clearly a means, not an end.

Jurisprudence, then, would seem to be the scientific synthesis of the essential principles of law. I have tried to explain what I mean by a science and how I understand it to differ from a philosophy. It is hardly necessary to add the word 'positive' to 'law', for it is difficult to imagine how any law, rightly understood, can be anything but positive, in Austin's sense—i.e. made by men for men—except, to quote Austin again, by metaphor or analogy. It is no longer necessary—though it would have been

¹ The extent of the variations will be realized by a glance at some of the arrangements collected in Pound's *Jurisprudence Outline*, 103 ff.

necessary a hundred and fifty years ago—to explain that by law we do not mean a real or supposed principle of uniformity in the physical universe, such as the 'law' of gravity; nor a mere facultative convention, such as a 'law' of fashion.

I say the essential principles of *law*, not of *laws*, believing that jurisprudence is concerned with law not as a body of fortuitous phenomena in a particular setting, but as a human institution; and I deny that the variations of particular laws, enormous though they are, entirely occlude the basic elements on which law *qua* law is built.

If it be asked what is meant by 'essential' principles, and if it be objected that this word begs the question as to the true subject-matter of jurisprudence, I reply that this difficulty is felt, and is inevitable, in all sciences. It is the task of every science to discover, by the best methods and the best observation at its command, what *are* the essential principles in a selected branch of knowledge. This cannot be determined in advance. I make again the reservation that the essential or fundamental is only relatively so, and that the conclusions of jurisprudence, like those of every science worthy of the name, are always subject to revision, and even to rejection, in the light of expanding knowledge and increasing data.

For English students a word of caution is necessary as to the very term 'jurisprudence'. Englishmen employ it in a sense different from that used by any other nation. *La jurisprudence* means in France what we should call case-law, while our 'jurisprudence' becomes *la doctrine*; and in other European languages, while there are many shades of expression for 'theory of law', 'jurisprudence' (*Furisprudenz*, &c.) is used in the sense of judge-made law. In the investigation of any foreign system of law, great confusion results for the English student unless this difference is constantly borne in mind.

If it is difficult to determine *what* jurisprudence is, it is, to many minds, even more difficult to discover *why* it is. The law, says the sceptic, is the law: if I wish to

understand the principles of the law, I study—the law! And, God wot, there is enough of it to study! What need for the supererogatory labours of the self-styled jurist?

In cruder, but probably in even more heartfelt tones, the student frequently asks: 'Of what *practical* use will jurisprudence be to me?'

In Austin's day it seems that jurisprudence was not only of no 'practical use', but was a positive handicap to any intelligent student of the law. He writes:¹

'There is (I believe) a not unprevalent opinion, that the study of the science whose uses I am endeavouring to demonstrate, might tend to disqualify the student for the *practice* of the law, or to inspire him with an aversion from the practice of it. That some who have studied this science have shown themselves incapable of practice, or that some who have studied this science have conceived a disgust of practice, is not improbably a fact. But, in spite of this seeming experience in favour of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it.'

It would be the height of uncharitableness to see in this passage any reflection upon Austin's own lectures.

The word 'practical' is one of the most loosely and basely used in the English language. Frequently it seems to be synonymous simply with 'financial'. It is clearly impossible to estimate the value of jurisprudence, or of any other branch of knowledge which is not purely banalistic, on this basis. The aim of any form of study is to enlarge knowledge, which proverbially is to enlarge power, and to augment intellectual equipment. That is 'practical' in the true sense.

But, while all systematic learning deserves attention and respect, it is idle to pretend that it is all of equal value. One cannot know everything, and a student is entitled to require that the subjects of his study shall have some reasonable relation to his opportunities, to the time at his command, and to his intended activities. It cannot be

¹ *Lectures*, ii. 1118.

denied that a good deal of jurisprudence, or at all events of some kinds of jurisprudence, has exposed itself to the reproach that the results achieved are sadly disproportionate to the effort expended. It is not learning—though it often parades as learning—to multiply arbitrary classifications and distinctions, or to engage in interminable symposia of other people's theories. The process often seems to resemble that of working down from the roof of a top-heavy structure of stone in order to prove that the foundations are of sand; and one is sometimes tempted to think that no new theory of law could be sufficiently empty and perverse to prevent the accumulation of a whole library of literature proving how empty and perverse it was. But all solid studies are at the mercy of the pedant; and the real marrow of jurisprudence cannot fail to supply nourishment to the lawyer who partakes of it with discretion. Law is a body of interrelated principles, and jurisprudence is the systematic synthesis of them; they cannot but suffer if they are left to be acquired—here a little and there a little—by mere trial and error. It is an agreeable accomplishment to be able to play a musical instrument 'by ear', but anybody, except the unblushing 'vamper', who possesses that accomplishment knows how greatly it accentuates the sense of loss and insufficiency in not knowing the real principles of music. The law is too great and too complicated an instrument for blundering improvisation. In the actual practice of the law, that which distinguishes the master-craftsman from the mere competent journeyman is the comprehension of his art as a coherent whole. No man knows all the law; after lifelong experience the practitioner will frequently have to turn his attention to aspects of it which are comparatively unfamiliar, and indeed, not seldom to 'unsettled' portions of it for which mere appeal to authority will not suffice; but he who has imbibed the scientific spirit of the law will see his way to the heart of the matter, while the empiricist, however adroit, will be groping in a murk of minutiae. That is what is meant, in the concrete application of law, by a

'grasp of principle' or a 'legal instinct', and, even from the most severely 'practical' point of view, it is of infinitely higher value than ready mechanical proficiency. It is only too true that jurisprudence, in some of its more rarefied forms, seems to lose all touch with reality; but it is a curious mental myopia which scorns the principles of jurisprudence because they are 'mere abstractions'—for all law is abstraction. It consists of principles of reason and logic which exist nowhere but in the abstract. Law cannot, in reality, ever operate by sheer empiricism. The mechanic may make the wheels go round by a lucky experiment: the physician may heal a patient by a lucky experiment: I do not mean that good mechanics or physicians rely solely or even often upon lucky experiments, but when purely physical results are in contemplation, chance may achieve a desired end without the intervention of reason. But no legal problem can be settled by chance or experiment, for its solution depends upon a principle and nothing but a principle. The physician administers a drug which he knows produces a certain effect, but he does not know how and why it produces that effect. It is a fact of experience that atropine applied to the eye will cause the retina to expand; but why it does so is as yet a mystery to science. But law, being in itself reason, can administer only remedies which it apprehends rationally in inception, in effect, and in purpose. I refer, of course, to law which has passed beyond the stage of superstition and barbarism.

Consequently English law, like every other system of law, stands immensely indebted to those who have approached it with the express object of formulating it in systematic, significant abstractions. The 'practice book' which consists solely in the accumulation of particularized rules has its uses, as a gazetteer or a ready reckoner has its uses; but it is not such manuals, for which patience and industry are the only necessary ingredients, which have exercised a creative influence upon our law. John Stuart Mill—a writer from whom the tribute is somewhat

unexpected—had abundant evidence on his side when he wrote:¹

‘Whatever definiteness in detail, and whatever order or consistency as a whole, has been attained by any established system, has in almost all countries been given by private writers on law. All the generalizations of legal ideas, and all explicit statements of the meaning of the principal legal terms, have, speaking generally, been the work of these unauthorized persons—have passed from their writings into professional usage, and have ended by being, either expressly, or oftener by implication, adopted by governments and legislatures.’

But while the principles of law and of jurisprudence are abstractions (for the excellent reason that all principles are abstractions), they are something much more. There is another reason why jurisprudence is essentially ‘practical’. The doctrines of certain branches of thought, by their very nature, need never descend from the upper ether. They may be of high value to mankind without being primarily intended for application to concrete circumstances. A man may be an admirable philosopher without ever attempting to carry any of the truths of philosophy into his conduct: a man may be a highly accomplished astronomer without appreciating the most elementary facts about human life and human nature. It is otherwise with jurisprudence. Law is concerned with the actual facts of society, the actual relations of human beings to each other. Its abstractions exist *in order to be applied*, and they are both meaningless and valueless unless they are capable of being translated into the terms of real life. More—the conceptions of legal science are catholic in their scope: they are of universal interest and universal importance: they are the concern of everybody everywhere. It has been well said by a Russian writer, who himself contrives to maintain nice poise between legal noumenon and phenomenon:²

‘You can find, perhaps, in our social organization a man who has never concerned himself with natural science or history. Well,

¹ *Dissertations*, iii. 214.

² Korkunov, *op. cit.* 7.

search the age, there is no one wholly unconcerned with legal questions. It is something quite unthinkable. Be ever so misanthropic, avoid mankind however carefully, yet legal questions shall not pass around you. In any event there is one domain of law, that of personal liberty, which shall imperatively demand your attention. In shunning men you must say to them, "Here commence the bounds of that domain where I am free; you have no right to encroach upon it". For all these reasons, it is in legal science that the tendency to generalize ought to manifest itself more imperiously than anywhere else.'

But the most enthusiastic devotee of jurisprudence would not contend that it is a popular study in England. It is an affectation of the English to depreciate their own intelligence, and if we like to adopt that pose we may say that the neglect of jurisprudence in our country is due to a temperamental inability or disinclination to think. But this is shallow and demonstrably false. If we are unable or disinclined to think jurisprudentially in the manner and in the language of certain among our near neighbours, one can endure that circumstance with some measure of equanimity. We have at least been able to think clearly enough to create a legal system which, if it does not assemble all the perfections which have sometimes been claimed for it, has not been without its meed of admiration and even of envy. By their fruits ye shall know them: the English Common Law is not the product of a national intelligence which is incapable of aspiring to the more esoteric mysteries of the Higher Jurisprudence.

The scepticism of the English lawyer concerning jurisprudence as a specialized branch of study is largely due to the fact that he sees no necessity for it. Either it wanders into speculations which, without necessarily underestimating them, he regards as philosophy or politics having no real relation to substantive law; or else it consists of the exposition of legal rules which are already abundantly, and perhaps better, expounded elsewhere. What other jurisprudence, he asks, does anybody want than the vast learning of the Common Law? Our judges are our jurists!

And whatever Mill or another may say of the services of 'private writers on law', if the English lawyer is in search of jurisprudence, he will seek it in the judgements of the great luminaries of the English Bench.

And he will undoubtedly find it. English and American judges are, or have the opportunity of being, jurists in a degree which is quite impossible for judges in most other parts of the world. Judgements in most European countries, consisting for the greater part of deduction from code and statute, are far more restricted in form and scope than our own. They are not, of course, mere mechanical exercises in logic: they must be *motivés*, and it is needless to say that many of them are masterpieces of exact and pregnant reasoning. But it is a type of reasoning far less 'at large' than that of English judgements. The business of the English judge, and of any good judge, is to decide the issue between the parties, not to allow his fancy free play in the vast and flowery Bypath Meadow of the law: but the general principles involved in the issue—and often an issue small in intrinsic material interest may involve principles of profound importance—these he may examine at what length and in what form he chooses. Considering the largeness of the English judge's charter, the amount of prolixity and irrelevance in our Law Reports is singularly small by comparison with the great bulk of invaluable juristic doctrine. Our books abound in judgements which, going far beyond the bare settlements of disputes and the application of technical rules, are treatises of deep learning, acute reflection, patient historical research, and sometimes high literary merit. Considered in the mass, the recorded pronouncements of the English Bench form certainly one of the imperishable intellectual monuments of the world. It is not unnatural to ask what more or better jurisprudence any student requires.

But the argument recoils upon itself. The very luxuriance of judicial jurisprudence creates the necessity for extrajudicial jurisprudence. We have in our Law Reports an extraordinary bulk of judicial reasoning

scattered over an enormous area, and ever increasing. It is applied to a multitude of different circumstances, and much of it is inevitably concerned with the examination of particular evidence and facts. In aggregate, it is almost unlimited in its range: in detail, it is necessarily localized. There is consequently all the more need for the detached, scientific method which, from this plenty, will canalize, as it were, the main streams of principle and direct them into the reservoir of general legal doctrine.

So far this occupation, which ought to present many attractions, has not been altogether fortunate in its exponents. The English literature of jurisprudence, meagre and unenlivening as it is, has not endeared the study to many of our youth. Austin was the first to attempt to define the subject and to erect it to the status of a distinct science: disappointment attended his efforts, and few have followed him. Courageous though his enterprise was, there is perhaps no legal writer more difficult to read without sensations amounting almost to physical anguish, and the mere word 'jurisprudence', by association with the word 'Austin', produces in many minds an emotion little short of panic. There seems to be a process of action and reaction; the manner in which our law has grown has not been encouraging to the pure science of extrajudicial jurisprudence, and on the other hand jurisprudence has done little to commend itself to the professional lawyer. Will there some day arise a greater Austin, no less patient in method, no less meritorious in intention, but perhaps more ingratiating in manner? He may be *in posse*: one does not yet, it is to be feared, see him *in esse*.

STATUS AND CAPACITY¹

A NEW-COMER to this Chair may be forgiven if his respect for his predecessors is mingled with a sneaking grudge against them for being quite so distinguished as they have been. Two of those predecessors are still, most happily, with us: Sir Frederick Pollock, proving with each of many days that authority which seemed full-grown can still add to its vigour, demonstrates the modern doctrine that time is but an affair of clocks and calendars, not of the spirit of man. Dr. Walter Ashburner, a scholar whose footsteps are as sure upon the darkest ways of ancient and medieval learning as upon the high-road of English equity, brought back to us for too short a time his catholic erudition and his enlivening presence. I am not sure to which of two mutual benefactors I pay tribute if I say that he was certain to come back to Oxford and Oxford was certain to come back to him. We envy him the genial skies for which he has deserted us; but our envy is tempered by the confident expectation of much that he has yet to give us from the wealth of his attainments.

I cannot stand in this place without saluting the memory of another predecessor, whose spirit, even if he had not departed from us so recently, would still be living here and indeed wherever the kindred sciences of history and jurisprudence are nurtured. No poor words of mine can add a cubit to the stature of Paul Vinogradoff; but since he was to me for many years not only a mentor of inexhaustible wisdom, but a friend of inexhaustible kindness, I may be pardoned if to-day, with piety, with affection, and with no little trepidation, I am specially conscious of his immortality.

A few words must be said in explanation of, or apology

¹ An Inaugural Lecture delivered before the University of Oxford at the Examination Schools on Friday, March 7, 1930. Reprinted from the *Law Quarterly Review*, xli. 277.

for, the present subject. When I began to ask myself what I understood by the familiar term 'status', I discovered that my own ideas on the subject were, and always had been, disconcertingly vague. Frequent acquaintance had hardened me to this humiliating experience; what surprised me much more was that the literature both of jurisprudence and of technical law seemed to be uninformative on the subject. I turned naturally to the sphere where this conception has most immediate importance—that of Private International Law; and there, it seemed, the utmost uncertainty and controversy prevailed. Savigny said that in his day the confusion in the subject was 'somewhat wild'¹ and with the passage of time and the accumulation of decisions it does not seem to have been tamed. I found that writers were sometimes drawing laborious distinctions between status and capacity, at other times apparently drawing no intelligible distinction at all.² When my feeling of bewilderment was regarded indulgently, and even sympathetically, by my friend Dr. Cheshire (to whose criticism and expert knowledge I must at the outset express my indebtedness), I felt it necessary to make an effort, however rash, to arrive at some conclusion. Perhaps, however, I should have been deterred altogether from the attempt if, before writing these lines, instead of afterwards, I had noticed a discouraging remark of Austin's:³ 'To determine precisely what a *status* is, is in my opinion the most difficult problem in the whole science of jurisprudence.' I need not say how tentative my conclusion is in view of the uncertainty to which I have referred; and my diffidence is accentuated by the fact that, for once, even Continental jurisprudence seems, so far as I can discover, to be reticent on this topic.

¹ *Syst.* viii. p. iii (Guthrie's Trans. p. i).

² See e.g. Westlake (5th ed.), s. 2, where status and capacity seem to become inextricably entangled: similarly Dicey (4th ed.), 515, Comment on 'First View'. No sustained distinction between the two things seems to emerge from Phillimore's discussion (iv. chaps. xv–xvii).

³ Lect. xv. 401.

There is a mass of learning on *Rechtsfähigkeit*, *Handlungsfähigkeit*, *Verfügungsfähigkeit*¹—terms of art to some of which I must briefly revert; but upon the precise juristic meaning of *Stand*, *Zustand*, *Stellung*, and *Rechtsstellung*—all which terms convey, in my submission, a conception different from *Fähigkeit*—I confess I can discover, so far as I have searched, little illumination.²

It will be well to glance first at some of the current senses in which the term 'status' is used. The late Sir John Salmond³ has been at more pains to examine them than any other modern English writer known to me. The four principal meanings which he ascribes to the term are in a kind of descending scale, proceeding from the widest to the narrowest connotations. Thus:

1. The sum total of any person's entire rights, duties, and legal relationships. I should venture to object to this definition, for reasons which will appear, that status is not a mass or aggregate of rights, but is a condition which qualifies a person for the exercise of rights. But in this first and very general sense to which Salmond refers the word is often used as indicating the mere fact that a man has a *locus standi* before the law—that he is, in short, a person in the eye of the law, on the one hand subject to its discipline, and on the other entitled to claim its remedies.⁴ It seems to bear this sense in the distinction, established by the celebrated case of *Udney v. U.* (1869), L.R. 1 Sc. App. 441, between political and civil status, and also in one of the few English judicial attempts at definition, *per* Brett L.J., *Niboyet v. N.* (1878), 4 P.D. at p. 11: 'The legal

¹ *Eigenschaft*, which is sometimes translated 'capacity', but seems rather to mean an *attribute*, lies somewhere between the notions of *Fähigkeit* and *Stand*.

² See, however, Gierke, DPR. s. 46, p. 294, note (45), *post*.

³ *Jurisprudence*, 266.

⁴ Cf. the definition of Donellus cited by Phillimore, iv. 239: 'conditio personae cuiusque—ius, facultas vivendi et faciendi quae velis quae ei conditioni tribuitur.' Cf. Bentham, *Morals and Legislation*, chap. xvi. s. xxxviii: 'A man's condition or station in life is constituted by the legal relation he bears to the persons who are about him.'

position of the individual in or with regard to the rest of the community' (the Lord Justice goes on to explain that this 'legal position' is one which is imposed compulsorily by law, not voluntarily adopted by the person concerned). This dissenting judgement, in a case which has now been overruled,¹ may serve as an example of the difficulties inherent in the vague and popular interpretation of status which I have quoted. If the judgement be examined in the light of criticisms which have recently been made of it in the House of Lords,² it seems to follow logically from Brett L.J.'s reasoning that while a married woman clearly has a status in law, the term could not properly be applied to a spinster or bachelor.³ The House of Lords, on the other hand, seems to be of opinion that celibacy is just as much a matter of status as marriage. Lord Dunedin says this in terms at p. 662. We shall, I think, find that 'status', though sometimes loosely employed to denote the general attribute of being a true and lawful person within the jurisdiction of a particular community, in most of its applications has a more restricted and a more technical meaning. Savigny⁴ holds that the employment of the term in the wide and indistinct sense now under consideration is mere popular usage, without any precise juristic significance. In particular, he attacks the extremely ill-defined conception of *status naturalis*, so dear to most of his predecessors. When, however, he himself goes on⁵ to define the *technical* meaning of status as 'the position or standpoint (*Stellung oder Standpunkt*) which the individual man occupies in relation to other men', we do not feel that he has helped us greatly to a clearer understanding or has quite succeeded in avoiding the vagueness which he himself condemns. His chief thesis, however, is to draw the distinction between *status publicus*, which he associates

¹ In the case next cited.

² *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641.

³ The point (now reversed) being that a foreign decree of nullity of marriage is *not* a judgement affecting status.

⁴ *Syst.*, ii. App. vi.

⁵ *Ibid.*, 454.

solely with *libertas* and *civitas*, and *status privatus*, which he identifies solely with family law. This discussion, into which we cannot now enter, has special reference to Roman law, and gives us little guidance as to the meaning of status in the legal systems of to-day.

2. The sum total of an individual's *personal* rights and duties, as distinct from his *proprietary* rights. This appears to be the meaning which Salmond himself approves. But it is not at all clear what he means by 'a man's legal condition, only so far as his personal rights and burdens are concerned, to the exclusion of his proprietary relations'. 'Thus', we are told, 'we speak of the status of an infant, of a married woman, of a father, of a public official, or of a citizen; but not of a landowner or of a trustee.' But how is it possible to consider the status of an infant or a married woman 'to the exclusion of their proprietary relations'? In English law, at least, it will be apparent from the first glance at the rules affecting the status of infants and married women that they are (or have been) concerned very largely indeed with proprietary capacities or, more particularly, incapacities. The distinction which Salmond draws¹ between proprietary and personal rights is the distinction between interests which are capable of assessment in money and those which are not. If we eliminate from the notion of an infant's status (to take one example) all rights which are capable of pecuniary estimation, it seems that very little is left.

3. A more restricted sense of 'personal condition'—i.e. the aggregate of a person's capacities and incapacities. 'The law of status in this sense would include the rules as to the contractual capacities and incapacities of married women, but not the personal rights and duties existing between her and her husband.' As to this theory, which will require further consideration, it is only necessary to say at present that the term 'personal condition' seems to be somewhat obscure, if it is intended to comprise only 'personal' as distinct from 'proprietary' rights; for such

¹ *Jurisprudence*, 264.

matters as contractual capacity clearly affect proprietary rights.¹

4. Legal condition imposed by operation of law, as distinct from rights and duties acquired by the person's own voluntary act. This again will call for further discussion.

The wide differences between these interpretations are sufficient to suggest that this common term 'status' is elastic to snapping-point. To Austin belongs the credit of the only sustained attempt in English (so far as I know) to analyse the conception systematically. It gave him ample scope for that 'untying of knots' which he declared was his favourite occupation.

Austin's treatment² of the topic makes curious and interesting reading. The general effect is one of somewhat injured surprise that a subject about which so great a fuss has been made should turn out on closer examination to be much ado about nothing. Following his usual method, he considers and dismisses a number of current definitions, into which it is not now necessary to enter. We should, however, note one fundamental respect in which he differs from an accepted notion of status, supported especially by Bentham.³ Bentham conceives status as a *quality* or *condition* which generates certain rights and duties. It is to him 'a set or collection of rights and duties arising from one *investitive fact*':⁴ and it is the investitive fact which is its 'distinguishing mark'. Austin will have none of this; he is very impatient of the theory that status is a 'quality

¹ This third sense of status Salmond attributes to Dicey, giving the references 'Conflict of Laws, 458, 2nd ed.' I have not had access to the second edition; but in the fourth edition I cannot discover that Dicey anywhere describes status in a manner which justifies Salmond's distinction, quoted above, in the case of a married woman. The definition of status, at p. 509 of Dicey's *Conflict of Laws* (4th ed.), is: 'capacity for the acquisition and exercise of legal rights and for the performance of legal acts'. This is certainly open to objection, since it draws no distinction between status and capacity; but it does not seem to support the distinction which Salmond draws in his example.

² Lects. xl ff.

³ *Ibid.* 722 (Campbell's ed.).

⁴ *Ibid.* 725.

which lies or inheres in the given person'.¹ This idea is 'merely a case of the once current jargon about *occult qualities*'. He insists that there is nothing abstract about status; it is simply an aggregate of concrete, specific, substantive rights and duties.

On the other hand, he does not regard it, as writers on Private International Law so often seem to regard it, as an aggregate of *capacities* and *incapacities*. 'Status is not a capacity, or a bundle of capacities, but a bundle of rights and duties *with* capacities.'² Capacity 'must be taken with relation to the given investitive fact, as well as to the given right or given duty'.³ In other words, capacity is not the same thing as the right which depends on it; it is the power to exercise the right in certain given circumstances; while incapacity is the lack of the power to do so. This, as we shall see, is a distinction of value.

If, then, status is simply a collection of rights and duties, how does it differ from the whole general sum of rights and duties belonging to all persons who are subject to the law? Solely, answers Austin, in the fact that it applies to a limited class of persons. His final definition is this:⁴ 'Where a set of rights and duties, capacities and incapacities, specially affecting a narrow class of persons, is detached from the bulk of the legal system, and placed under a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacities, is called a status.'

And he adds, with a certain petulance not uncommon with him:⁵ 'And this, it appears to me, is the whole rationale of the matter. Though such is the pother made about status, that nothing but a most laborious inquiry into the subject could convince me that there was no more in it.'

In other words, an expedient of method, a device of legal exegetics. *Vox et praeterea nihil*.

Later, in a Fragment, he says, more summarily:⁶ 'Wherever a set of persons have rights, obligations, etc.

¹ p. 720. The theory is also rejected by Savigny, *Syst.* ii. 445.

² p. 740. ³ p. 735. ⁴ p. 746. ⁵ p. 747. ⁶ p. 758.

peculiar to themselves; or are incapable of such as are common to many others, there is a status: or, in other words, the persons are determined to, or constitute a class.'

It does not matter, in Austin's view, what the class is—he would not, for example, agree with Salmond that infants have a status while trustees have not—but a class of some kind, with rights and duties peculiar to itself, is essential to his notion of status. Thus he considers that the term is improperly applied to a freeman or citizen; for he means by status¹ ('the only meaning which I can possibly attach to it') 'a set of rights and duties, specially regarding persons of a given class, which for the sake of a convenient arrangement, it is expedient to detach from the body of the legal system'. This Austin conceived to be the sole significance of status in Roman Law, serving as it did for the useful, but by no means scientifically infallible, division of the law into that of persons and things. 'The law of Things is *the law*; the *corpus iuris*, minus the law of status or conditions.' It is equally legitimate and, in the opinion of some, even more convenient to expound the law of different kinds of status where and when they occur in different departments of the law of things—e.g. the status of a minor or slave would not be considered in a general preliminary discussion, but separately in connexion with contracts, torts, inheritance, and so forth. This, for example, is the method preferred and advocated by Salmond.² This ancient controversy concerning the *ius quod ad personas pertinet* and the *ius quod ad res pertinet* is a question of form, not of substance; and I mention it here only to emphasize Austin's general position that the question of status is really one of *method*.

A completely different conception of status is expressed, curtly but suggestively, in one of the most famous legal aphorisms in the English language; and in view of the large issues which it raises, it is surprising that it has not excited more comment from the juridical, as distinct from the purely historical, point of view. The idea which

¹ p. 742.

² *Op. cit.* 267.

emerges from Maine's 'movement of progressive societies from status to contract' is that status is a legal condition imposed by law on the individual independently of his own choice and as the result of circumstances which are beyond his own control. In early societies, a man's whole legal position depends on whether he is bond or free, native or foreign, child or parent, male or female, and so forth; and these tests of legal standing are clearly matters which the individual does not decide for himself—they are accidents of birth and circumstance. Ancient law is a jurisprudence of personal inequalities. The growth of 'contract' in 'progressive' societies means that the individual becomes more and more able to determine his legal rights and duties by his own free agreement.

The law of status (Maine's argument proceeds) has therefore continuously shrunk. But some portions of it still remain in all modern States. Every system of law has to take account of the peculiar status of the infant, the orphan, the lunatic (it is odd that Maine, in 1861, did not add the case of the married woman, but the omission did not at that date affect his chief point). All these modern cases Maine reduces to one principle, viz. that the persons in these special classes 'do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract'.¹

To sum up: In this view, every man, in normal circumstances, is free to determine, according to his own will, his rights and duties towards his fellow-citizens. (Maine does not trouble to add, for it is too self-evident to need mention, that they must be such rights and duties as the law permits.) But if he has not sufficient will to determine this for himself, the law imposes on him certain defined capacities and incapacities which constitute his status. It would seem to follow that Maine, like Austin, would apply the term only to 'narrow classes of persons', not, e.g. to a freeman or a citizen.

Let us consider in the light of this test the different

¹ *Ancient Law*, 173.

kinds of status which are known, or have been known, to the law—not only to English law, but to legal systems generally. They are well summarized by Holland.¹ (1) Sex. (2) Minority. (3) *Patria potestas* and *manus* (or let us say, more generally, familial relationship). (4) Coverture. (5) Celibacy. (6) Mental defect. (7) Bodily defect. (8) Rank, caste. (9) Official position. (Holland groups these last three together, but it is better to separate them, for reasons which will appear.) (10) Race and colour. (11) Slavery. (12) Profession. (13) Civil death. (14) Illegitimacy. (15) Heresy. (16) Foreign nationality. (17) Hostile nationality. And we may add: (18) Criminality and (19) Bankruptcy.

Now the great majority of these kinds of status will come within Maine's principle. Sex, minority, position in a family, mental and bodily defect, rank and caste, race and colour, slavery, illegitimacy, nationality—all these are aspects of a man's personality over which he himself has no control whatever. The capacities and incapacities which are attached to them by law are entirely independent of the individual's choice. There are unimportant exceptions—thus by adoption or arrogation a person might be artificially introduced into a family; a free man might by his own act be reduced to a condition of slavery, a slave might become free; but it is unnecessary to insist that these are exceptions of a kind which do not affect the general principle.

But there are other cases in this catalogue in which we cannot say that status arises involuntarily. Thus coverture and celibacy are matters of choice. Similarly a man's official position, his profession, his heretical opinions, arise from his own acts of will; he certainly chose his own civil death when he became a religious, and in a sense he chose it when he became a felon, for he voluntarily did the act which made him a felon. Even now a criminal may be said to *will* for himself the status of a convict, with its proprietary disabilities. So with bankruptcy.²

¹ *Jurisprudence* (13th ed.), 351.

² Bankruptcy in England chiefly affects a man's contractual capacity,

And yet we feel at once that even in these cases the 'legal condition' which accompanies them is something very different from the 'legal condition' which results from the voluntary act of becoming, say, a mortgagor. The mortgagor defines for himself his own rights and duties *vis-à-vis* the mortgagee and other persons interested in the mortgaged property. He may and often does understand those rights imperfectly, but he must be presumed to know and to choose the legal consequences which flow from his act of agreement. So again, a woman chooses to enter into the married state; she voluntarily undertakes certain definite conjugal duties and acquires certain definite conjugal rights. But over and above this act of choice there is something which the law imposes independently of her free election. The principle is well expressed by Viscount Haldane in *Salvesen v. Administrator of Austrian Property*, [1927] A.C. at p. 653:

'For what does status mean in this connexion (i.e. marriage)? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognizes as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This juridical result is more than any mere outcome of the agreement *inter se* to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds: something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of.'¹

and has little influence on his general status; but in some countries, e.g. in France, if of a culpable kind, it carries with it certain civic disabilities: see Duguit, *Manuel de Droit Constitutionnel*, 689, 789.

¹ Cf. Salmond, *op. cit.* 267; and Lord Merrivale P. in *Papadopoulos v. P.*, [1930] P. at p. 58: 'Nullity of marriage is not merely a matter *inter partes*. The public are interested.' And see Lord Penzance in *Mordaunt v. M.* (1870), L. R. 2 P. & D. 109, 126.

It seems, then, that Maine's central assumption needs modification. It is true that most of the different kinds of status which from time to time have been recognized by law grow out of circumstances which lie beyond the control and choice of the individual; to this extent they are fortuitous and arbitrary. But it is also true that status may *originate* in the individual's voluntary act. Even in that case, however, Maine's principle is still true to this extent—that to rights and duties voluntarily undertaken the law superadds certain capacities and incapacities which are independent of the individual's own choice. In this respect, status, properly understood, and however it may originate, differs from free agreement.¹

Maine's statement requires modification in another respect. From a consideration of the different kinds of status already mentioned, it will be sufficiently evident that status in modern law does not necessarily depend on *defect of judgement*. There are manifest reasons why persons of imperfect judgement should be segregated, as it were, into classes specially protected by the law. But these considerations do not arise in such cases as social or professional rank, illegitimacy, religious persuasion, nationality, penal status, nor even (necessarily) in servile status. In all these cases there are different grounds of policy—grounds which need no discussion at present, for they are plain *ex facie*—for according special treatment to the individuals comprised within the class. While, therefore, defect of judgement—or, more generally, *natural incapacity* of mind or body—is the commonest cause of peculiar status, the law *may* attach that quality to a particular class on any ground of policy which social exigencies dictate. It is impossible to imprison within a single

¹ In the first edition of his *Contracts*, Sir William Anson wrote: "The essential feature of a status is that the rights and liabilities affecting the class which constitutes each particular status are such as no member of the class can vary by contract while he remains a member of the class"; and a note adds that this suggestion may at least be more fruitful than Austin's treatment of the subject. The passage is omitted from more recent editions. Cf. Markby, *Elements of Law*, ss. 168–80.

definition the different occasions of policy which may arise in different circumstances, and in connexion with different classes of persons.

A further criticism results from the last objection: status, in Maine's theory, is purely matter of *incapacity*. There is no reason why it should not also be matter of peculiar *capacity*. It is not usually so; yet it surely would not be incorrect to describe as matters of status the peculiar privileges which the law may ascribe to a certain rank or official position in the State. We should, I think, rightly speak of the status of a peer of the realm, or of a foreign ambassador; but their status is certainly not one of mere incapacities. The curious German Nobility Law (*Adel-recht*)¹ was, and to some extent still is, almost entirely a law of privileged status.²

¹ See Gierke, DPR. ss. 47 f.; Hübner, DPR. s. 13; Gerber, DPR. 629; Schuster, *German Civil Law*, 579.

² These criticisms are confined to Maine's conception of the juridical meaning of the term status. The general proposition contained in his famous aphorism is another matter, and has been criticized from other points of view. Professor Pound (*Interpretations of Legal History*, 53 ff.) regards it as an expression of the 'political interpretation' of legal history, and in particular as a formula of the Hegelian and nineteenth-century ideal of the maximum of free individual self-assertion. This notion of 'the will as the central conception in jurisprudence' Maine purported to find in Roman Law: Professor Pound argues that it is not to be found in actual Roman legal history, but in the interpretations of modern civilians. It is not applicable to the history of the Common Law. 'The will theory of legal transaction as an idea of contract, upon which the political interpretation builds, is not a universal idea of all law. It is relative to Roman Law. It is a generalization from doctrines expressing the problem which chiefly concerned Roman lawyers in the beginnings of Roman juristic activity—the problem of adjusting the conflicting claims of heads of households exercising authority within their households and jealous of authority without—interpreted in terms of the juristic problem of the nineteenth century.' Cf. the same writer's *Introduction to the Philosophy of Law*, chap. vi.

Sir Paul Vinogradoff (*Rights of Status in Modern Law*, in *Collected Papers*, ii. 230) criticizes Maine's principle from another point of view. Status, he holds, is essentially a conception of public law, and in modern social conditions a 'public law status' gains ground at the expense of free contract, especially in industrial relationships. 'The working class in

These deductions made, we may still find in Maine's conception a principle of value—viz. the *extrinsically determined* quality of status as contrasted with the self-determining quality of agreement. To Austin's analysis

general is assuming under modern conditions a standing that imparts to it rights and duties co-ordinated under a law of status different from that which governs the rest of the community. Although the single workman undertakes labour under a contract of service and enters into relations with his employer by agreement, three facts modify this contractual arrangement—the tendency of special work to react on the whole personality of the men concerned with it, the association of workmen of the same trade into powerful unions organized for the protection of the interests of workmen, and, lastly, the social welfare policy of the modern State. As a result the working mass has ceased to be a number of "hands" seeking employment, and has become a *class* in consciousness and in law. It strives to set up certain standards of living, it prevents the victimizing of single members, it claims work or maintenance for the unemployed. . . . The treatment of class interests on the basis of a separate social status is not confined to economic speculation and political struggles, but is assuming a legal aspect.

'Looking back on the fluctuations of the historical process we may say, I think, that the conception of status is winning back some of its ancient importance, because the modern State itself is being gradually transformed. It is not considered merely as the umpire and guarantor of relations between individuals, but as a leader in social work. It does not watch with indifference the competition between its members, but seeks to further their welfare and to harmonize their interests. As to work and labour it is not the detached agreement that is held to be decisive for the standing of the parties, but rather an estimate of the standard of living and of the social requirements of professional men.'

Here again we seem to have the idea of a condition imposed by law *over and above* rights and liabilities voluntarily acquired by agreement. See also Sir F. Pollock, Note L, to Maine's *Ancient Law*. With regard to Sir Paul Vinogradoff's main criticism, it is fair to observe that Maine (as Professor Pound points out) guarded himself by saying that 'the movement of progressive societies has *hitherto* been', &c. It need hardly be added that since Maine's words were written, the former antagonism of the law to restraint of trade has been greatly modified: see Pound, *op. cit.* 61 ff. Even as long ago as 1859, Byles J. observed: 'It is a popular, but in my judgment a mistaken, notion that parties ought to be at liberty to enter into contracts after their own fashion' (*Mumford v. Gething*, 7 C.B. (N.S.) 320); and this view certainly seems to have grown at the expense of the 'paramount public policy' which Jessel M.R. made famous in a familiar dictum: *Printing Co. v. Sampson* (1875), L.R. 19 Eq. 475. Cf. Ihering, *Geist des römischen Rechts*, iii. 337 f.

we are indebted for the identification of status with the notion of determinate *class*. We are now in a position to attempt a definition of status. It appears to be the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both.¹

It will be observed that this view of the matter differs in at least one fundamental respect from Austin's. Austin, as we have seen, scouted the notion that status was a condition, and insisted on regarding it as an agglomeration of substantive rights and duties. His arguments, however, are supported by very little demonstration. Status, it is submitted, is essentially the fact or condition of membership of a group; it is not the same thing as the actual abilities or disabilities which accompany such membership. When a Court delivers a judgement *in rem*,² it declares that a particular person falls within a particular generic description—married or single, bankrupt or solvent, and so forth. It is true that in many cases a Court may have to decide, first, a question of status, and second, a question of capacity or incapacity which flows from that status; e.g.

¹ Westlake, *Private International Law* (7th ed.), 49, defines it as 'the sum of the particulars in which a person's condition differs from that of the normal person'. This concentrates upon the 'particulars' rather than (as here suggested) the condition which gives rise to them. Holland, however (*op. cit.* 138), cites Westlake as defining status in section 89 of the first edition as: 'that peculiar *condition* of a person whereby what is law for the average citizen is not law for him'. Holland himself (p. 143) considers all cases of status as being '*abnormal deviations* from the ordinary case of both parties concerned in a right being human beings, under no special and far-reaching disability or exemption'. Cf. Bar, *Private International Law*, 300.

² *Scil.* affecting the status of a person. Admiralty judgements of forfeiture or prize, and grants of Probate and Administration, are also often called judgements *in rem* 'affecting status'; but all that seems to be meant is that they are conclusive matters of record with the effect of estoppel against the whole world. It seems impossible to apply the word 'status' to inanimate things, except, of course, to fictitiously personified inanimate things—which, conceivably, a ship may be for certain purposes in English law. Much confusion arises from the widely divergent meanings of the term '*in rem*': see Hohfeld, *Fundamental Legal Conceptions*, 69.

when infancy is pleaded to an action on contract; and in some circumstances the question of status requires, *in limine*, a particularly rigorous form of proof—thus, on a charge of carnally knowing a girl between the ages of thirteen and sixteen, the Court requires strict proof of age. But whether the judgement be primarily one of status, as in a decree of divorce or nullity, or whether it decide questions of mixed status and capacity, so far as it does concern status it declares the generic condition of a particular individual. This, evidently, is what Lord Shaw has in mind when, in *Salvesen's Case*, at p. 662, he braves Austin's scorn of 'occult qualities' by referring to the status of marriage as 'a metaphysical idea'.

But what constitutes a 'class of persons' in contemplation of law? It is plain that anybody, with a little ingenuity, may indulge his fancy by dividing society into an almost infinite number of classes. The mere fact that a plurality of persons engage in the same activity, or possess common characteristics, constitutes them, in one sense, a class. We may, if we choose, divide up the whole community into the blue-eyed class, the brown-eyed class, the black-eyed class, and so forth. The division would have no legal significance, though conceivably to some scientist or statistician it might be important. Or we might, to take an example at random, classify the community on the basis of its amusements, and we should have a golf-playing class, a cricket-playing class, a bridge-playing class, and so on. No legal consequences flow from the *mere fact* of belonging to any of these groups of persons. When therefore we speak of a class in relation to status, we mean a class of such a kind that, by an established rule of law, legal consequences result to its members from the mere fact of belonging to it.

Again, when we say that legal consequences flow from membership of a class, it is necessary to distinguish between rights and duties on the one hand and capacities and incapacities on the other hand. Just as it is possible to anatomize the population into an infinite diversity of

classes, so it is possible to distinguish an infinite diversity of specific rights and duties which attach to different groups of persons. A very large number of persons own wireless receiving-sets; each one of them is under a duty to pay for a licence, each one of them has the right to receive broadcast sound-waves. Another large class of persons owns motor-cars; they are all under certain duties of registration, licence, and taxation. Yet we should at once feel an absurdity in speaking of the status of a 'listener-in' or of a motor-car owner. These individuals possess in common certain specific rights and duties in regard to a particular kind of thing; their *capacity* is not affected in any general way. Or again, there is a very large class of persons who hold shares in limited companies; they have certain specific rights and duties in respect of a particular *corpus* of property—their general contractual capacity is in no way influenced by the mere fact that they belong to the class of shareholders. A trustee is placed under certain stringent obligations; so is a company director. But we should feel something odd, I think, in speaking of the status of a shareholder, or a trustee, or a company director. Their general juridical capacity is unaffected by the fact of belonging to the class of shareholders, trustees, or company directors. A trustee must answer to his *cestui que trust* for a breach of duty, but he has a legal capacity to commit the breach if he chooses. If he invests trust money in speculative concerns, the transaction is not void; if he sells trust property in breach of trust, the title passes to a bona fide purchaser without notice—the trustee's act is not a nullity, nor yet nullifiable, unless he fraudulently colluded with the purchaser. When we compare this case with one of the most familiar examples of status—infancy—we see at once that status means more than specific rights and duties in relation to specific things or transactions: it means a condition affecting capacity generally. For example, in the domain of contract, the consequence of an infant's status is a general incapacity to contract, modified, however, in certain necessary and important

circumstances. The same could have been said of a married woman before 1882. If we consider separately the other commonly-recognized forms of status which have been already mentioned, we shall find that all of them involve, though in varying degrees, some such *general condition* of capacity or incapacity, as distinct from specific rights and duties in respect of specific relationships.¹

This leads us to inquire a little more closely into the nature of *capacity*. The Germans are accustomed to distinguish two aspects of capacity—the passive, i.e. capacity for *enjoyment* of rights (*Rechtsfähigkeit*), and the active, i.e. the capacity for *exercise* of rights (*Handlungsfähigkeit*). The distinction is very fully discussed by Savigny,² whose analysis, however, is somewhat obscured by the fact that, dissenting from Wächter, he declines to regard any aspect of capacity as being an attribute of personality, and holds that capacity is to be understood and judged only by its operation. It is difficult to see how the passive *Rechtsfähigkeit*—a kind of latent potentiality—can be anything but an attribute.³ The words *Rechtsfähigkeit* and *Handlungsfähigkeit* have become commonplaces in the terminology of German jurisprudence,⁴ and I can perhaps best

¹ Cf. Holland, *op. cit.* 143. Criticizing the wide or popular sense of status which is mentioned *ante*, p. 31, Savigny writes (*Syst.* ii. 446): 'According to this definition, the possession of a right is represented as a quality (*Eigenschaft*) of man, and thus, for example, the *status civitatis* is the content of all the rights which belong to a citizen. But if this principle is adopted, it is not clear why it is not carried out to all its consequences. All other rights, as well as those of the free man and the citizen, may be regarded as qualities of their possessor. We should then have a status of husbands, of the proprietor, the usufructuary, the creditor, the heir, and so forth, and the whole science of law would be contained in the theory of status. To reduce the theory of status to a general theory of law is to abandon it altogether as a special and independent theory.'

² *Syst.* ss. 60, 106 ff., 362.

³ Wächter's distinction is adopted by Bar, ss. 133 ff. Pillet (*Traité de Droit International Privé*, s. 237), without discussing the merits of the distinction, holds that Private International Law is concerned only with *Handlungsfähigkeit*.

⁴ See e.g. Windscheid, *Pand.* i. s. 71: 'Unter (juristischer) Hand-

express their acceptation in the words of Gierke:¹ *Rechtsfähigkeit*, the capacity to enjoy rights, is an absolutely essential characteristic of personality and can never be divorced from it; *Handlungsfähigkeit*, the capacity to exercise rights, is an important characteristic of personality, but not absolutely indispensable; 'it concerns private law only as a *completion* of personality when the *Handlungsfähigkeit* of others is brought into relation with it'. For example, a newly-born baby, and even, for some purposes, the child *en ventre sa mère*, has full *Rechtsfähigkeit*: it is no whit the less a person in law because it lacks, in its own person, *Handlungsfähigkeit*.

Rechtsfähigkeit is an abstraction which cannot now concern us. To say that a person has capacity for enjoying rights is merely to say that he is a person. In the past there have been certain kinds of human beings who were wholly or partially incapable of enjoying legal rights; but I do not think that there is or can be any human being completely lacking *Rechtsfähigkeit* under modern law—at all events, under modern English law: though it is true that theoretically outlawry still exists. By capacity, then, for our present purposes we mean the ability to exercise (which of course presupposes the ability to acquire) specific rights, not the mere ability, in general, to possess legal rights. By incapacity we mean the converse of this ability. It goes without saying that capacity or incapacity may be total or partial.

There is a clear distinction between the capacity to acquire and exercise rights, and the rights which are exercised. My ability to enter into certain transactions and to obtain certain advantages does not necessarily mean that I do in fact enter into those transactions or obtain those advantages. Capacity, therefore, is something which

lungsfähigkeit versteht man die vom Rechte gewährte Fähigkeit zum Handeln mit rechtlicher Wirkung'; and Binding, *Die Normen*, ii. 46: 'Handlungsfähigkeit ist die Fähigkeit zur persönlichen Vornahme rechtlich relevanter Handlungen irgend welcher Art.' Cf. Regelsberger, *Pand.* s. 57.

¹ DPR. s. 40.

is *latent* and *potential* in the individual: it is, to borrow a familiar term of art, a condition precedent to the exercise of rights. Not until the will has been exerted within the scope allowed to it by law do the rights come into existence. Unless the capacity exists, no rights arise—the attempted transaction is null. The individual has acted *ultra vires*, like a corporation which lacks capacity to enter into certain kinds of transactions.

And that expression—*ultra vires*—so familiar to all lawyers, reminds us of the essential characteristic of capacity. It is a power;¹ static in the sense that it is latent in the individual, but dynamic in the sense that it affects rights and duties as soon as it is exercised. Status, on the other hand, is a condition. Status is, if the tautology may be pardoned, essentially static. There is no question of *exercising* a status. It is a thing which *is*, and which continues until it is ended or changed. Capacity is a thing which *can*.

We must, then, distinguish three quite separate things: Status, the condition which gives rise to certain capacities or incapacities or both; Capacity, the power to acquire and exercise rights; and the Rights themselves which are acquired by the exercise of capacity.

Thus a judgement affecting status *simpliciter*—e.g. a decree of divorce or a declaration of legitimacy under section 188 of the Judicature Act, 1925—declares, conclusively against the whole world, the condition of the person affected. Judgements of this kind are rare in English law; questions of status and capacity usually arise *incidentally* to disputes concerning specific rights;² and in

¹ 'An ability or fitness to receive: in Law it signifies when a man or body politick is able to give or take lands or other things or to sue actions': Cowell's Interpreter, cited by Lawrence L.J., *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, 699.

² Austin (Lect. xv. 402) points out the difference in this respect between Roman and English law. 'The right in a status may by the Roman law be asserted directly and explicitly by an action expressly for its recovery; while in English law no such action can be brought, and the right to a status, though of course it often becomes the subject of a judicial decision, almost

such disputes—e.g. in a case concerning an infant's contract—the Court generally has to decide: (1) whether the individual belongs to a particular class possessing a particular status (this is not usually contested, but in some circumstances it may have to be strictly proved); (2) what capacities and incapacities flow from that status (e.g. whether by the general rule of English law an infant is capable of binding himself by the particular kind of contract which is before the Court); and (3) what actual rights and duties, if any, are effected by the particular transaction in litigation (and this is not conclusive against the whole world, but only between the parties and their privies).

The importance of these distinctions, and the complexities to which they give rise, are best seen in the sphere of Private International Law. It is believed, with submission, that most of the confusion which surrounds the subject of status arises from the fact that the two terms 'status' and 'capacity' have not been sufficiently differentiated in meaning.

It is now reasonably safe to say that the balance of authority favours the view that, with certain exceptions, status is determined by the personal law (by English law,

always comes in as an episode, incidental to an action of which the direct purpose is something else. Thus a question of legitimacy, which is precisely a question of status, is usually brought in and decided upon incidentally, in an action of ejectment. The question whether or not a particular person is a *slave*, would generally come before the judge upon a prosecution by the slave of the person claiming to be his master for doing some act which would be illegal unless the claim could be established. The only case in which a question of status is decided directly by English law, is when a jury is summoned to try that precise question as an *issue* incidental to a suit in another court.' The last sentence, though possibly true in Austin's day (divorce he might consider a *legislative* act), is too narrow for modern law. And is the difference between Roman and English law as great as Austin represents? Questions as to status—e.g. of a slave or *filiusfamilias*—arose far more frequently, one would have supposed, as 'episodes' in matters of property or delict than in actions for the direct 'recovery' or assertion of a status. However, on *status quaestio*, *status causa*, and *status controversia*, see Savigny, *Syst.* ii. 466.

the *lex domicilii*).¹ As an illustration of the principle—the strongest example known to me in the relevant case-law—we may take *Goodman v. G.* (1862), 3 Giff. 643, where three illegitimate children born in England while the deceased was domiciled in that country were excluded from a bequest to children of property in England, while a child born in Holland and legitimated there *per subsequens matrimonium* was admitted. Dicey's very cautious statement² is this:

'Whether our Courts have on this subject adopted any one invariable principle may be doubted; but they have, of recent years, gone so far as to hold that an individual's legal condition is, in many cases, liable to be affected by the law of his domicil, and perhaps they may be said to have adopted, in a very general way, the rule that status depends *prima facie* on domicil; but in practice this principle is subjected to limitations which often go near to invalidating it.'

If the rule is to be accepted, even with these qualifications, it amounts to this: that whether or not an individual belongs to a particular status-class, depends upon the law of the community to which that class belongs and to which the individual himself belongs by domicil, that is, by his habitual mode and place of life.

Now, if the view which has been here presented be well founded, it is clear that this rule necessarily follows from the very conception of status. It is indeed incongruous in theory and impossible in practice that it should be otherwise. For since there is no world-wide law, and since classes of persons are, for purposes of legal rights and duties, determined by law, an individual can hardly be

¹ 'Hoc ipsa rei natura ac necessitas innoxit': Rodenburg, tit. 1, c. 3, s. 4; 'L'homme est partout de l'État, soit universel, soit particulier, dont sa personne est affectée par la Loi de son domicile': Boullenois, I, 6, 18th Princ.; Regelsberger, *Pand.* s. 41, I, 1; Stobbe, *DPR.* s. 30, I, 1. See Lord Westbury in *Udney v. U.* (1869), L.R. 1 Sc. App. 441, 457, and in *Shaw v. Gould* (1868), L.R. 3 H.L. 55, 83; *Re Goodman's Trusts* (1881), 17 Ch.D. 266 (Cotton L.J. at p. 292, James L.J. at p. 297). Cf. Cleveland, 'Status in the Common Law', 38 Harvard L.R. 1074. For the history of the subject, see Pillet, *op. cit.* i. chap. xvi.

² *Conflict of Laws* (4th ed.), 510.

conceived as belonging to a world-wide class. He belongs to a class within a particular community, for, as Gierke insists,¹ status is essentially a *social* conception. No judgment delivered by the Courts of one community can possibly affect the social circumstances of another community. Similarly, the recognition of foreign status, when and so far as it is accorded, is not a matter of so-called 'personal law', but merely of international comity.² Status, it has been submitted, is a legal condition, a legal state of being; but since all law, except Public International Law, is of territorial ambit, the legal condition of an individual is necessarily dependent on local or 'municipal' circumstances.

So much, I believe, is not really open to serious doubt on principle or on authority; but as soon as we approach the rules governing capacity, we find ourselves in an atmosphere of fierce controversy.³

Capacity to contract is the typical case, and will be the most profitable for us to consider. Let us suppose that a contract is entered into in a foreign country where the party is by the *lex loci actus* of full capacity, though by his *lex domicilii* he is incapacitated; and action is brought in the *locus actus*. For example, an Austrian aged twenty-two enters into a contract in England; suppose that by the law of his own country the age of majority is twenty-five; is he able to plead that by his *lex domicilii* he is a minor and therefore that action cannot be brought against him in England?

The overwhelming majority of the older writers on Private International Law held that the *lex domicilii* as to capacity was a personal law which adhered to the individual wherever he went and whatever obligations he undertook; and among this body of opinion stands the great authority of Savigny.⁴ Their doctrine has been well

¹ DPR. s. 46. Cf. Hübner, DPR. s. 13.

² See Pillet, s. 238.

³ For a comparison of some of the extremely conflicting rules of different systems upon this subject, see Stobbe, DPR. s. 30.

⁴ *Syst.* ss. 362, 367, in accord with Huber, s. 12. 'It is therefore my opinion, that every one is to be judged as to his personal status [*in seinen persönlichen Zuständen*] always by the law of his domicile, whether the

epitomized by Pillet:¹ 'Le principe de la personnalité des lois de capacité signifie que les qualités de la volonté de la personne une fois déterminées par la loi compétente suivent cette personne en tout pays, étendant leur autorité à tous les actes qu'elle peut faire et à tous les biens objet de ces actes en quelques lieux qu'ils soient situés.' Despite this impressive and almost unanimous body of doctrine,² Story arrived at a decided opinion that the rule of English Common Law was otherwise.³ In this view he had the concurrence of Chancellor Kent,⁴ and of *dicta* of Ware J. in the leading case of *Polydore v. Prince* (1837), Ware 402 (Beale, *Cases on Conflict of Laws*, i. 738 (see especially at p. 740)). Indeed, it may be said summarily that the consensus of American opinion has adopted Story's view.⁵

judgement is at home or abroad, and whether the personal quality [*Eigenschaft*] itself, or its legal effects, be the object of the judgement': Guthrie's trans. p. 108.

¹ *Op. cit.* s. 237. Cf. Stobbe, DPR. s. 30, III. 1.

² The jurists whose opinions are examined by Story are Boullenois, Froland, Bouthier, Rodenburg, Paul Voet, Pothier, Merlin, John Voet, and Huber.

³ S. 103: 'In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus* aut *actus*. . . . Therefore, a person who is a minor until he is of the age of twenty-five years by the law of his domicile and incapable, as such, of making a valid contract there, may nevertheless, in another country where he would be of age at twenty-one years, generally make a valid contract at that age, even a contract of marriage.'

S. 241: 'It has been shown that although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet that the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern.'

In *Brook v. B.* (1861), 9 H.L.C. at pp. 227 ff. and 241 ff. Lords Cranworth and Wensleydale were of opinion that Story's rule was not intended to cover the case of a marriage prohibited or declared to be incestuous by the personal law.

⁴ 2 *Comm.* 233 n. (c), 459 n. (b).

⁵ See Beale in 10 Harvard L.R. (1896) at p. 171, criticizing Dicey's view; and see cases cited *ibid.* at p. 172, n. 4. The clearest judicial authority is *Milliken v. Pratt* (1878), 125 Mass. 374 (Beale, *Cases*, ii. 281).

In England, Foote leans towards Story's view.¹ Sir Cresswell Cresswell,² Lord Romilly,³ Lord Hannen,⁴ and Lord Gorell⁵ all seem to have shared it. But direct decision of the point there is none⁶—not even *Male v. Roberts* (1800), 3 Esp. N.P. 163, a decision of Lord Eldon's which is usually cited in this connexion; for the facts of that briefly-reported *Nisi Prius* case are far from clear, and what is said is at the best indirect authority upon the point now at issue.⁷

On the other side, in England, the strongest judicial authority is a *dictum* of Cotton L.J., giving the judgement of the Court, in *Sottomayer v. De Barros* (No. 1) (1877), 3 P.D. 1, a case which will claim our further attention. In *Cooper v. C.* (1888), 13 App. Cas. 88, 99, Lord Halsbury seems to adopt the view of the older jurists.⁸ Of extra-

¹ *Private International Jurisprudence*, chap. iii.

² *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

³ *Re Hellmann's Will* (1866), L.R. 2 Eq. 363.

⁴ *Sottomayer v. De Barros* (No. 2) (1879), 5 P.D. 94.

⁵ *Ogden v. O.*, [1908] P. 46.

⁶ *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, leaves the question open.

⁷ The plaintiff paid, in Scotland, a debt for goods supplied in Scotland to the defendant, in order to save him from a Scots writ which would have prevented him from leaving the country. The defendant was an infant, and the goods were not necessities. Plaintiff sued in England, and failed. Lord Eldon said: 'The contract must be . . . governed by the laws of that country where the contract arises', and assumed (there being no evidence to the contrary) that the law of Scotland was the same as that of England with regard to infants' contracts of this kind. The report does not inform us what the defendant's domicil was, but presumably it was English. In accord with *Male v. Roberts*, Beale (*Cases*, ii. 9, n.) cites *United States v. Garlinghouse*, 4 Ben. 194 (*semble*); *Appeal of Huey*, 1 Grant Cas. 51; *Thompson v. Ketcham*, 8 Johns. 190. I regret that I have not had access to these cases.

⁸ But the contract (an ante-nuptial settlement) was *made* in the wife's country of domicil, though it was intended that the couple should, after marriage, live in the husband's country of domicil (Scotland). Story's rule in section 64, therefore, which Lord Halsbury cites at p. 99, is not inconsistent in the circumstances of this case with his rule in sections 103 and 241 (*ante*, p. 51, n. 3); and Lord Macnaghten (p. 108) and Lord Watson (p. 105) expressly guard themselves against adopting in full the

judicial opinion, the strongest in favour of Savigny's rule is Dicey, but with 'very wide exceptions'.¹

Are we not here in the presence of that not uncommon legal phenomenon—a rule which is perfectly logical and practicable in the social circumstances of one age, but which becomes impracticable (whether it remain logical or not) in the circumstances of another? Every English lawyer will at once think, in this connexion, of the development of our rules concerning restraint of trade.² In days when distances were formidable, any 'general restraint' may well have seemed harsh and extravagant.

rule of the older jurists. It was argued that as the settlement was intended to be carried out in Scotland, it should have been governed by the *lex loci solutionis*, which was different from that of the *lex loci contractus* (Ireland); but Lord Watson (p. 105) was not satisfied that Scotland was in reality intended to be the *lex loci solutionis*.

¹ 'Rule 158.—Subject to the very wide Exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of making the contract.'

Some of the cases cited by Dicey and others in favour of this Rule seem to give it very slender support. *Re Cooke's Trusts* (1887), 56 L.J.Ch. 637, and *Re Bozzelli's Settlement*, [1902] 1 Ch. 751, are the strongest: but in the former case Stirling J., and in the latter case Swinfen Eady J., seem merely to have followed the dictum in *Sottomayer v. De Barros* (No. 1) (*ubi sup.*) without question. *Cooper v. C.* (*ubi sup.*), as we have seen, is no authority for the general Savignian rule. It is impossible to regard the judgement of Sir J. Nichol in *In b. da Cunha* (1828), 1 Hagg. Ecc. 237, as authoritative. There administration was granted to a residuary legatee, herself a minor and the wife of a minor, both spouses being 'resident' in Portugal, upon a certificate being produced that by Portuguese law she was entitled. The grant was limited to the receipt of dividends from English funds. No reasons are given, except that 'no possible inconvenience can arise from this limited grant'. The parties are referred to as *subjects* of Portugal, but we are not even told whether they were domiciled in that country. In *Folliot v. Ogden* (1789), 1 H.Bl. 123, the bond upon which action was brought in England was given in America before the Declaration of Independence, and the fact that the obligor's property had been forfeited, on an attain in New York after the Declaration (a purely local and penal matter), was clearly no bar to an action in England. *Ogden v. O.*, [1907] P. 107, cited by Dicey and discussed by him in his Note 23, stands in an equivocal position in view of *Salvesen's Case* (*ubi sup.*): see *post*, p. 64, n. 1. As to *Gutpratte v. Young* (*ubi inf.*) and *Viditz v. O'Hagan* (*ubi inf.*), see *post*, p. 63, n. 1.

² See *ante*, p. 40, n. 2.

To-day, when distance shrinks every moment before our eyes, a general restraint is not *ex hypothesi* excessive. Similarly, in an age of slow and restricted intercommunication, there was nothing intolerably inconvenient in the principle that a man carried his personal law of capacity with him wherever he went in a small world. In the world of to-day, however, the inconveniences which might flow from the doctrine are so manifest that we might well wonder, apart altogether from the extremely conflicting authorities, whether it was likely to perpetuate itself.

The true position at the present time I conceive to be this: No Court can affect the status possessed by a person in another country; that proposition I base on the general and undisputed principle that jurisdiction is limited by the effectiveness of judgement.¹ But in questions of capacity the situation is far different. The Court then has to deal not with a general legal condition, but with the rights and duties arising out of specific transactions which definitely fall within its jurisdiction. The policy which it then adopts is well summed up in Dicey's Rule 138; and this Rule, in my humble submission, cuts most of the ground away from his Rule 158, which adopts the Savignian principle. Except in cases, he says, concerning a status which is unknown to English law, or a status which is purely penal, 'the existence of a status existing under the law of a person's domicile is recognized by the Court, *but such recognition does not necessarily involve the giving effect to the results of such status*'. In other words, the Court, though it does not claim to affect the person's status in his own country (for the excellent reason that it could not if it would), reserves to itself the right of saying that in regard to a particular transaction, it may or may not permit the person to exercise the *capacities*, or may or may not place him under the *incapacities*, which would in his own country result from his status.² As Littledale J. observed in

¹ See Dicey, *General Principle No. III*, 33.

² See Dicey's *Third View*, p. 517, and n. (h), *ibid.* In *Polydore v. Prince (ubi sup.)*, Ware J., speaking in 1827, gave the following striking example:

Birtwhistle v. Vardill:¹ 'The very rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the *consequences* of that status are sought to be enforced.'

This policy is dictated by obvious reasons of expediency and justice. To take our previous example: a foreigner seeks to evade his obligations on the ground that being of foreign domicile, and being an infant by his *lex domicilii*, he is incapable of entering into a contract in England. No English Court could tolerate this manifest injustice: its first duty is to fulfil as far as may be the reasonable and *bona fide* expectations of its own domiciliaries. 'No nation', says Story² (following Huber), 'is under any obligation to give effect to the laws of any other nation which are prejudicial to itself or to its own citizens; . . . in all cases every nation must judge for itself what foreign laws are so prejudicial or not; and . . . in cases not so prejudicial, a spirit of comity and a sense of mutual utility ought to induce every nation to allow full force and effect

'In England, a person who has incurred the penalties of a *praemunire* or has suffered the process of outlawry against him can maintain no action for the recovery of a debt or the redress of a personal wrong. But would it be contended that because he could not maintain an action in the forum of his domicile, that (*sic*) he could have no remedy on a contract entered into, or a tort done to him, within our jurisdiction?'

¹ In the King's Bench (1826), 5 B. & C. 455.

² S. 76. It is noteworthy that French law, while holding that capacity is governed by the *lex domicilii*, neutralizes this doctrine in great part by protecting French creditors, if they have acted *bona fide* and without rashness, against persons who are minors by their own law but not by French law: see Bar, ss. 140, 142. Regelsberger, *Pand.* s. 41, first distinguishes between status *per se* ('*Rechtsstellung einer Person an sich*') and capacity to acquire a specific right or to enter into a specific obligation. Status, he holds, is governed by the *Personalstatut*. Capacity for specific rights (e.g. ownership of real property, paternal power, guardianship, inheritance) is governed by the local law (here *Gesetz*) which governs that particular kind of transaction. But (he proceeds) the decision whether a person should be *protected against danger* lies with his *Personalstatut*, which holds good universally; and from this he draws the conclusion that all capacity (which here seems to be equated to incapacity) is matter of the

to the laws of every other nation.'¹ And again: 'It is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts of that country.' There may be powerful reasons of public policy why the capacities and incapacities of one legal system shall not be enforced by another; for clearly public policy must vary greatly in different communities. If an Oriental has by the law of his own country the right to kill his wife for adultery, or his son for disobedience, his *lex domicilii* will not avail him as a defence if he exercises those rights in this country. Our Courts would not, as will be submitted presently, in any way deny the status of the husband and wife in such a case; but they would not allow that status to produce practical results which would shock English ideas and disturb public order. In short, whatever a person may *be* in his own country and under his own law, what he *does* is very much the business of the Courts of that country in which he happens to find himself. I cannot put the point better than in the words of Heffter: ²

'Every legal relation which has sprung up under the sanction of a competent state is an accomplished fact for every one; but no state is thereby obliged to allow to that fact the same effects as the other state allows or determines. . . . Never can a legal relation be forced upon another state which that state reprobates; never can a legal relation be made to operate to [produce?] effects which are

Personalstatut. But even this must be further qualified, for he proceeds to explain that this rule cannot be applied without large exceptions (especially in commercial transactions) in favour of those who are *bona fide* ignorant of the *Personalstatut* of the foreigner with whom they are dealing. All this seems unnecessarily complex and inconsistent. Stobbe, DPR. s. 30, iii. 1, states, without exceptions, that the age of majority is governed entirely by the *lex domicilii*.

¹ Cf. *Sottomayer v. De Barros* (No. 1) (*ubi sup.*), at p. 7: 'No country is bound to recognize the laws of a foreign State when they work injustice to its own subjects.' And see Savigny, s. 349.

² *Das Europäische Völkerrecht der Gegenwart* (4th ed.), s. 37, cited Savigny, *Private International Law* (Guthrie) (1st ed.), 264.

repugnant to the legal system of the country, or effects which are only permitted to its own domestic relations. . . . It can by no means be maintained that the very existence and conditions of a legal relation which has sprung up in a foreign independent state, are to be judged entirely according to its own law by every other state where the consequences of it come into question.'

In many departments of Private International Law we see this principle at work. For example, guardianship and adoption raise important questions of status and capacity, and until recently the status of an adopted child was unknown to English law. Many older jurists¹ claimed for guardians universal *capacity*, and their views were discussed by the House of Lords in *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; but Lord Cottenham was clearly of opinion that foreign guardians and curators have not, as such, any rights in this country, though Lord Campbell seemed to think that they had rights over the *person* of the ward, without conceding the same rights over movable property.² The status of a foreign guardian under his *lex domicilii* is undoubtedly recognized as a fact by English Courts,³ but the capacities which he will be allowed to exercise in England are entirely within the discretion of the Court.⁴ The law, it is believed, is accurately stated by Bigelow C.J. in *Woodworth v. Spring* (1882), 4 Allen 321 (Beale's *Cases*, i. 732), viz. that foreign guardianship has no validity in itself; but it does not follow that the Court will not in its discretion permit it to be exercised within the *locus fori* in specific instances, *if that is in the best interests of the ward*.⁵

¹ Boullenois, Merlin, Vattel, Huber, and Hertius: *contra* Paul Voet.

² Story, s. 504 a.

³ Dicey, §18.

⁴ *Stuart v. Bute* (1861), 9 H.L.C. 440; *Re Chatard's Settlement*, [1899] 1 Ch. 712; Dicey, Rule 144. There seems, however, to be a growing tendency to recognize and give effect to the powers of a foreign curator unless there is any strong reason to the contrary: *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15; *Pélégryn v. Coutts*, [1915] 1 Ch. 696.

⁵ It is believed that *Nugent v. Petzera* (1886), L.R. 2 Eq. 704 is not inconsistent with this principle, and does not establish any universal capacity in the guardian over the ward's person.

Very similar is the rule concerning lunatics. A foreign curator or committee, though undoubtedly possessing an unimpugnable status by his *lex domicilii*, has no rights *ipso facto* in this country, though he *may* be allowed to exercise certain capacities, within the discretion of the Court, for the benefit of the lunatic.¹

Again, whatever the familial status of a child may be in its own country, the powers exercised over it by its parent in this country are entirely controlled by English law.²

Legitimacy is a strong example of the principle that status is governed by the *lex domicilii*. On the one hand, our Courts never claim to settle this particular question of status for anybody but their own domiciliaries; on the other hand, a child born in lawful wedlock anywhere is universally recognized as possessing the status of legitimacy;³ indeed, Dicey goes even farther, and maintains that a foreign status of legitimacy is not merely recognized as, but *is* legitimacy in England.⁴ 'What', asked James

¹ Dicey, Rule 148. *Furiosus* is common to all countries; but of *prodigus*, though he still exists in French law, we know nothing in this country, and therefore will not allow his *conseil judiciaire* any *locus standi* in our Courts: *Re Selor's Trusts*, [1902] 1 Ch. 488. The reason of convenience or public policy is not very apparent; but *scil.* the case supports our contention inasmuch as the *conseil judiciaire* could not, *as such*, claim capacity in England.

² Dicey, Rule 142.

³ Savigny, s. 380; Bar, s. 102; Dicey, Rules 66, 145, and 146 (especially pp. 532-4). 'Children born out of this country are not the subject of our bastardy laws': *per* Lord Denman C.J., *R. v. Blane* (1849), 13 Q.B. 769, 772. The conflict between this case and *R. v. Humphreys*, [1914] 3 K.B. 1237 is more apparent than real. The former decided against, and the latter for, an affiliation order; but in the former the mother was a foreigner and the bastard was born in France, while in the latter the bastard, of domiciled English parents, was born abroad.

⁴ This proposition, it is submitted, places a wider construction than they will bear upon the two cases cited by Dicey in favour of it. In *Re Goodman's Trusts (ubi inf.)* the question was whether a child legitimated *per subsequens matrimonium* in Holland could be considered as 'kindred' in England for the purposes of intestate succession. The Court was careful to say that the Statute of Distributions was not for Englishmen only but for all persons, English or not, dying intestate and domiciled in England, and that it

L.J.,¹ 'is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognized, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born.'² What, then, of capacity? Does a foreign status of legitimacy give the individual the capacity, for example, to take property in England upon an intestacy or bequest? At first sight, it would almost seem so. Thus although, until three years ago, our law stood almost alone in the world in refusing to allow legitimation *per subsequens matrimonium*, again and again our Courts recognized the right of a child who was, in another country, legitimate *per subsequens matrimonium*, to succeed to personal property in England. But this familiar rule, it is submitted, does not establish any general principle that capacity to exercise rights in England follows automatically upon a foreign status of legitimacy. 'If we examine the matter closely', writes Bar,³ 'we find that all the rules as to legitimation rest upon considerations of public order, upon *boni mores*'; and this is as true of legitimacy itself as of legitimation. There was never anything shocking to English morality in recognizing legitimation *per subsequens matrimonium*,

applied universally to persons of all countries, races, and religions whatsoever; and it was not unreasonable, therefore, that the proper law for determining the 'kindred' should be 'the international law adopted by the comity of States'. In *Re Grey's Trusts*, [1893] 2 Ch. 88, Stirling J. avowedly followed (see at p. 92) the *ratio decidendi* of Kay J. in *Re Andros* (1883), 24 Ch.D. 639, which appears to be this: *whom did the testator* (domiciled abroad) *intend* by his legitimate children? The answer is that he intended children legitimate by his own *lex domicilii*, though not necessarily so by the law of England. Foote (p. 119), it is submitted, states the rule accurately when he says: "'Child" . . . means child by the *lex domicilii*.'

¹ *Re Goodman's Trusts* (1881), 17 Ch.D. at p. 296.

² Thus a person who is legitimate by the law of France cannot be a 'stranger in blood' for purposes of legacy duty in England: *Skottowe v. Young* (1871), L.R. 11 Eq. 474.

³ S. 194.

which had commended itself to most civilized nations, and which existed even within the British Isles. From the point of view of strict morality, there was, as Phillimore points out,¹ little to choose between the Roman doctrine of subsequent marriage and the English rule by which a child was legitimate if born after, though conceived before, marriage. But there might easily be circumstances in which foreign rules of legitimacy or legitimation would not accord with English standards of morality, and it is by no means certain that in such cases our law would admit the child to succession, despite his unquestionable status under his own law. There is still doubt, for example, whether English law would recognize legitimation by the act of a foreign state—e.g. by *privilegium* in the form of decree or enactment, analogous to the Roman *rescriptum principis*—without the intermarriage of the parents.² Is it probable that we should recognize an *adulterinus*, who in some legal systems may be legitimated by reception into the father's family, as capable of succeeding to property in England?³ Or the issue, who by Scots law may be legitimate, of a merely putative marriage—i.e. one which has been annulled on the ground of a previous marriage concealed from one of the parties, or on the ground of propinquity unknown to the parties?⁴ It is even doubtful whether the children of polygamous marriages, perfectly valid in the countries where they have been contracted, would be permitted to exercise rights of inheritance in England.⁵ There is no certain answer to these questions

¹ S. 537.

² Dicey, 543; Bar, s. 198; Phillimore, s. 542; Schäffner, s. 40, cited Guthrie's Savigny, 258.

³ Bar, s. 194. The Legitimacy Act, 1926, s. 1, sub-s. 2, would suggest a negative answer to this question. But see *In re Askew*, [1930] 2 Ch. 259.

⁴ See Dicey, 530, n. (j).

⁵ The question is left open by *Hyde v. H.* (1866), L.R. 1 P. & D. 130 (see Dicey, 290, and *post*, p. 68), and by the curious case of *Re Ullee* (1885), 54 L.T. (N.S.) 286, though in the latter case Chitty J., at first instance, seemed to incline to the view that the children of a Mahomedan marriage would be considered legitimate for all purposes in England.

at present; but it is difficult to doubt that foreign rules of legitimacy and legitimation might be regarded by English Courts as *contra bonos mores*, and that in such circumstances the capacities which usually accompany the status of legitimacy would not be permitted by our law.

Even in recognizing foreign legitimation *per subsequens matrimonium*, we have taken the view, which seems to rest upon very slender foundations,¹ that the status of the child must be determined by the law of the father's domicile *both* at the time of birth or conception and at the time of the marriage;² and herein we have differed from the consensus of foreign learned opinion (now at last adopted by the Legitimacy Act, 1926), which was always in favour of deciding this question by the law of the father's domicile at the time of the marriage only.³ And when real property was in question, our law regarded legitimacy in a manner very peculiarly its own, to the surprise of foreign jurists.⁴ When the matter in issue was the devolution of realty upon intestacy to an 'heir', or a devise of realty to an heir *qua* heir, then it was not enough that the claimant should be legitimate by his *lex domicilii*;⁵ he must also fulfil the requirements of the peculiarly English conception of heirship,⁶ a conception which is not of the *ius gentium*, but, as the judges said in their answer to the Lords in the leading case, is 'sown in the land and springs out of it'.⁷ It is only within the last few years that this relic of feudalism, which ere now has excited judges to somewhat satirical

¹ The rule does not appear to have been laid down in terms until 1856, in *Re Wright's Trusts*, 25 L.J.Ch. 621 (followed six years later in *Goodman v. G.*, 3 Giff. 643). Westlake (s. 55) is of opinion that *Re Wright's Trusts* was based on a misunderstanding of *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817, and *Munro v. M.* (1840), 7 Cl. & F. 842 (in which latter case Lord Brougham leaned towards the Continental doctrine).

² Dicey, Rule 146.

³ Savigny, s. 380 (rejecting Schäffner's view); Bar, s. 192; Minor, s. 99.

⁴ e.g. Savigny, s. 380; Bar, s. 192; Story, ss. 93c ff.

⁵ The legitimacy of the claimant was fully recognized in *Birtwhistle v. Vardill* (*ubi inf.*).

⁶ See Dicey, 538.

⁷ *Birtwhistle v. Vardill* (1835), 2 Cl. & F. 571, 577.

impatience,¹ has been abolished by the combined effects of the Law of Property Act, 1925, and the Legitimacy Act, 1926,² except as to titles of honour and land limited to descend therewith.

An instructive case in this connexion is *Re Macartney*, [1921] 1 Ch. 522. The testator, a domiciled Englishman, was betrothed to a Maltese woman, but died in Malta, leaving assets in England, before marrying her. She was delivered of his child after his death. She obtained from a Maltese Court a declaration of paternity together with an order for the payment of perpetual maintenance out of the deceased father's estate. Now, the Maltese declaration of paternity, which settled the status of the child, was held to be a judgement *in rem* into which an English Court could not inquire (see at p. 532); but as to the order for maintenance, the question was whether, this being a judgement *in personam*, the Court would affirm the *capacity* of an illegitimate child to obtain perpetual maintenance from the English assets³ of its putative father. Astbury J. declined to do so, holding that a posthumous affiliation order was a cause of action unknown in England, and that to recognize a right of the kind claimed was contrary to English public policy.⁴

The chief doubt, in English law, has arisen with regard to capacity to marry. In 1877, in the case of *Sottomayer v. De Barros* (No. 1), 3 P.D. 1, the Court of Appeal laid it down in the clearest terms that capacity to marry was governed by the *lex domicilii*; and, not content with that, extended this rule, as 'a well-recognized principle of law' to contracts of all kinds. Unqualified though the dictum

¹ See Lush and James L.J.J., *Re Goodman's Trusts* (*ubi sup.*).

² See Dicey, 538 and 904.

³ *Scil.*, the order of the Maltese Court would be valid against any Maltese assets of the deceased: see [1921] 1 Ch. at p. 532.

⁴ There was the further ground that the Maltese order could not in any case be a final and conclusive judgement *in rem*, because according to Maltese law the maintenance awarded to the child could be varied from time to time, or terminated altogether, according to the circumstances of the child: see [1921] 1 Ch. at p. 531.

is, and despite the fact that it comes from high authority, it cannot be regarded as binding, since it went beyond the *res iudicanda* and was made in relation to hypothetical circumstances. The spouses in this case were both of Portuguese nationality, and were first cousins. By Portuguese law the marriage of first cousins is illegal without Papal dispensation. The parties married in England. The wife prayed in England that her marriage might be declared null and void, and it was ordered that the question of law be argued before the questions of fact were decided. As a matter of law, then, the Court of Appeal, reversing Sir R. Phillimore, held that the marriage was null and void, but upon the assumption that both parties were of Portuguese domicil. The case was then remitted to the Probate, Divorce, and Admiralty Division, where Sir James Hannen found as a fact that the husband was of English domicil. Upon that finding, he held the marriage to be valid. Though the opinion was not necessary to his decision, he was unmistakably disinclined to adopt the dictum of the Court of Appeal as to contractual capacity in general.

It is my humble submission—and in view of the peculiar circumstances of the case the submission may be made, I hope, without insubordination—that the dictum in *Sottomayer v. De Barros* (No. 1), unsupported as it is by the citation of any authority, cannot be accepted as an accurate statement of the law.¹ In *Ogden v. O.*, [1908] P. 46, 74,

¹ It is, as is pointed out in *Ogden v. O.*, [1908] P. at pp. 73 f., inconsistent even with itself: for 'it would logically seem to follow' from the dictum quoted 'that that part of the judgement which indicates that the opinion of the Court was confined to cases where both the contracting parties were, at the time of their marriage, domiciled in a country, the laws of which prohibited their marriage, should not have expressed that limitation and that the case of *Simonin v. Mallac* [*ubi sup.*] should have been overruled, and yet that case, according to our reading of the judgement, is approved'. A further objection is that the marriage was throughout considered 'incestuous', though it was not so by the general consent of Christendom. The cases of *Guépratte v. Young* (1851), 4 De G. & S. 217 and *Viditz v. O'Hagan*, [1900] 2 Ch. 87, usually cited as in accord with *Sottomayer v.*

it is explained on the ground that first cousins were positively prohibited from marrying in Portugal—i.e. their marriage was actually illegal—and that, assuming both parties to be of Portuguese domicil (which they were not), it might very well be that one country would, as a matter of comity, take notice of a positive prohibition of this kind existing in another country.¹ There is the further *De Barros* (No. 1), are, it is believed, not really so, for reasons set forth by Foote, pp. 103 ff.

¹ At the same time, it is difficult to follow the distinction drawn in this case, *loc. cit.* (drawn also by Foote, p. 101), between incapacity and illegality. Incapacity is not, of course, limited to physical incapacity. Its essence is inability to exercise rights in such a way as to produce certain desired legal consequences. First cousins who are, as a class, prohibited from marrying, are, *de facto*, capable of going through a ceremony of marriage and of cohabiting; but these acts produce none of the ordinary legal consequences of marriage—e.g. legitimacy of issue, or mutual rights of succession. It may be that by the mere simulation of marriage the putative spouses have done an illegal act and have incurred a penalty: but this is something quite distinct from their incapacity. A man is *de facto* capable of purporting to marry another woman while his first wife is alive, and by so doing he commits the crime of bigamy; but it would be correct to say that in law he is incapable of marrying a second wife while the first is alive.

The case of *Ogden v. O.*, here cited, is of dubious authority since the decision in *Salvesen's Case* (*ubi sup.*). A domiciled Englishwoman married in England (this important fact is misstated, no doubt *per incuriam*, in the judgement of the Privy Council in *Att.-Gen. for Alberta v. Cook*, [1926] A.C. at p. 455) a domiciled Frenchman. The marriage was declared null in France, but this decree of nullity was held not to affect the validity of the marriage in England: so that the wife's second marriage in England (the first husband being still alive) was bigamous. But she never went to France; and if, according to French law, she was never married to her husband, then she never acquired his domicil: and it was therefore a question whether the French Court ever had any jurisdiction over her: see *per* Lord Phillimore, *Salvesen's Case*, [1927] A.C. at pp. 669–70. In *Salvesen's Case*, however, there was never any doubt as to the jurisdiction of the Wiesbaden Court, and the importance of the decision is that it recognizes the validity in England of a foreign declaration of nullity, even though the marriage thereby annulled was celebrated according to a law other than that of the *lex fori* (in this case a French marriage annulled by a Wiesbaden Court).

So far, then, as *Ogden v. O.* denies the validity of a foreign declaration of nullity (it being assumed that the Court making the declaration had jurisdiction), it must be considered as overruled by *Salvesen's Case*. And

consideration that the so-called contract of marriage is very different from any other kind of contract known to our law—so different, that it is perhaps misleading to call it a contract at all. As Sir James Hannen (as he then was) said in *Sottomayer v. De Barros* (No. 2)¹: 'In truth, very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration.' Hence, even if capacity to marry be governed solely by the *lex domicilii*—and upon this point it cannot be pretended that our law is settled, though the balance of authority seems to be to the contrary²—it does not at all follow that all contractual capacity is governed by the *lex domicilii*.

in another respect the authority of the case seems doubtful. The wife was in a singularly unhappy position. Her husband having annulled the English marriage in France, she prayed for a declaration of nullity in England. This Bargrave Deane J. refused on the ground of want of jurisdiction. Sir Gorell Barnes P., on appeal, suggested that there was jurisdiction; but, in the light of later cases, the grounds upon which this suggestion was based seem to be erroneous. It appears to result from *Stathatos v. S.*, [1913] P. 46; *De Montaign v. De M.*, [1913] P. 154 (see Dicey, Exc. to Rule 63); *Att.-Gen. for Alberta v. Cook* (*ubi sup.*); *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; and *H. v. H.*, [1928] P. 206, that the wife could not, in these circumstances, obtain a divorce in England either on the ground of desertion and adultery, or on the ground (suggested by Gorell Barnes P.) that the husband, having deserted her and changed his domicile, was estopped from denying his English domicile; but that *if she relied on the foreign declaration of nullity*—i.e. 'brought an action on the judgement'—she would have succeeded. The difference is, therefore, really one of pleading. It appears that in *Simonin v. Mallac* (*ubi sup.*) the petitioner failed because, instead of relying on the foreign declaration of nullity, she contended that the governing law was the *lex domicilii*: see *per* Lord Phillimore, *Salvesen's Case* (*ubi sup.*) at p. 669 (a different interpretation from that given in *Ogden v. O.* (*ubi sup.*) at pp. 68–72).

¹ *Ubi sup.* at p. 101. Cf. Lord Haldane in *Salvesen's Case*, *ante*, p. 38.

² *Quoad solemnitates*, it seems to be clear that if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity, the marriage is invalid: *Scrimshire v. S.* (1752), 2 Hagg. Cons. 395; *Middleton v. Janverin* (1802), 2 Hagg. Cons. 437; *Dairymple v. D.* (1811), 2 Hagg. Cons. 54; *Berthiaume v. Dastous*, [1930] A.C. 79;

The subject has been further, and, I suggest, unnecessarily obscured by an exception made to the general rule concerning the relation between status and domicile—an exception, it is believed, which confounds status with capacity. It is expressed by Dicey in Rule 136: 'Transactions taking place in England are not affected by any status existing under foreign law which either (1) is of a kind unknown to English law, or (2) is penal.' Now it is admitted that this kind of status, however alien to English notions, will be recognized by our Courts as valid *within its own country of domicile*; thus Dicey opines that if a domiciled Spaniard suffered 'civil death' by becoming a monk, our Courts would admit his heir (under Spanish law) to succeed to real property in England.¹ But it is said that the status will not be 'recognized' outside the country of domicile. When the cases are examined, it appears that they all concern questions of capacity, not of status. Thus Dicey gives² the examples of a foreign Roman Catholic priest, who, by reason of his status according to his *lex domicilii*, is incapable of contracting a valid marriage in his own country; and of a negro who is in a like position. Both can contract a valid marriage in England. But what English law is 'recognizing' here is a capacity, consonant

Westlake, s. 19 (followed, with some hesitation, by Dicey, Exc. 2 to Rule 182). Conversely, if the marriage is valid in form by the English *lex celebrationis*, a spouse cannot plead an incapacity under his or her *lex domicilii* in order to annul the marriage in England: *Chetti v. G.*, [1909] P. 67; *Ex p. Mir-Anwaruddin*, [1917] 1 K.B. 634 (see Dicey, Note 15, p. 889). Still less, if the parties, though of foreign domicile or domicils, are validly married in English form, can they annul the marriage for purposes of English law by submitting to an order by consent made by a Court in the husband's country of domicile, that Court having no jurisdiction in nullity: *Papadopoulos v. P.*, [1930] P. 55. The principle is that whatever a person's status and capacity may be in his own country, if he intermarries according to the forms of another country, he must be taken to have submitted himself to the laws of that other country: see *Mitford v. M.*, [1923] P. 130, a case of a domiciled Englishman marrying abroad according to the forms of foreign law.

¹ Dicey, 514.

² p. 513. As to religious status, see Bar, s. 147; Gierke, DPR. ss. 54 f.; Hübner, DPR. s. 12.

with our public policy; the priest's or the negro's status in his own country is entirely unaffected.¹ As for 'penal status', most of the cases concern slavery, and, despite decisions like *Madrazo v. Willes* (1820), 3 B. & Ald. 353 and *Santos v. Illidge* (1860), 8 C.B. (N.S.) 861 (which do not really affect this aspect of the question), it has, for two centuries at least, been contrary to the settled policy of English law to permit any of the disabilities of slavery to be enforced within the King's peace.² But none of these cases do, or can, deny that the slave, once returned to his country of domicil, continues to possess a servile status, and may be treated accordingly. The attempt to force upon other countries our English detestation of the status of slavery was checked, to the tune of very substantial damages, in *Madrazo v. Willes (ubi sup.)*, and might have been similarly checked in *Buron v. Denman* (1848), 2 Ex. 167, but for the convenient doctrine of Act of State. The same question as arose in the famous *Somerset's Case* (1771), 20 St. Tr. 1 was before an American Court in 1837 in *Polydore v. Prince*, Ware 402, and in a classic judgement Ware J., holding that the slave's status could not be enforced against him outside his own country, based his whole reasoning not on the servile status according to the *lex domicilii*, but on the capacities and incapacities permitted to the negro by the *lex loci actus* (the *actus* being assault). It is believed with respect that this very learned judge laid down the true rule of law when he said (at p. i. 741 of Beale's *Cases*):

'The peculiar personal status, as to his capacities or incapacities, which an individual derives from the law of his domicil, and which are imparted only by that law, is suspended when he gets beyond the sphere in which that law is in force. And when he passes into another jurisdiction his personal status becomes immediately

¹ As to the argument founded on the dubious case of *Re Selot's Trusts*, see *ante*, p. 58, n. 1.

² Over and above this is the general rule of International Law that one country will not enforce the purely penal regulations of another: *Huntingdon v. Attrill*, [1893] A.C. 150.

affected by a new law,¹ and *he has those personal capacities only which the local law allows.*'

The qualifications expressed in Dicey's Rule 136 therefore do not seem to differ in principle from the general doctrine as to capacity; *whether or not* the status in question be one known to English law, our Courts reserve to themselves the right to decide whether they will enforce any particular capacities or incapacities which arise from a foreign status. But when the status is unknown to English law, the capacities and incapacities definitely will not be enforced. I am not venturing, therefore, to question the accuracy of Dicey's Rule 136 in its practical effect; my submission is only that the rule concerns capacity, not status. With respect, I suggest that the principle is more accurately formulated in Halsbury's *Laws of England*, vi. para. 354 (so far, at least, as contracts are concerned): '*Disabilities imposed by the lex domicilii and resulting from a status of a kind not recognized by English law will have no effect on the capacity to contract in England.*'

To take another example of a status 'not recognized' by English law: It is said that English law does not recognize or 'will not give effect to' any form of marriage other than the monogamous. The group of cases of which *Hyde v. H.* (1866), L.R. 1 P. & M. 130 is the chief and *Nachimson v. N.*, [1930] P. 217 is the most recent, seems to lay down this principle: A person of foreign domicil cannot employ the machinery of English Courts in order to dissolve a marriage of a kind which is unknown to English law.² A Mormon spouse polygamously married in Utah cannot dissolve the marriage in England by means of a procedure which was devised for monogamous marriage. The effect

¹ This must be read in conjunction with the previous mention of 'personal status'—'*as to his capacities and incapacities*'. There is no suggestion that the original status, in the strict sense, is changed.

² See *per* Lord Brougham, *Warrender v. W.* (1835), 2 Cl. & F. at p. 351. The rule does not appear to apply to Jewish marriages, which in some countries may be dissolved by the mere *repudium* of one party: *Spivack v. Spivack* (1930), 46 T.L.R. 243 (though this was a case of maintenance, not of divorce).

of the rule is purely negative; it says nothing positive as to the status of the parties. It is never denied that the parties may be irreproachably-wedded spouses within their own community; at the risk of redundancy, it must be repeated that the Court cannot affect that question, even if it would; what is denied is that they are spouses in the sense in which English law, and indeed all Christendom, understands the term. That being so, they can hardly expect to put in motion legal machinery which is clearly intended for spouses in the Christian sense. Lord Penzance in *Hyde v. H.* points out the absurdities which would result from any attempt to adapt the unadaptable; the parties would come before the Court asking for English matrimonial remedies, in a state of inextricably-tangled bigamy and adultery! The chief ground of his decision is the impossibility—apart from the undesirability—of attempting to bring one kind of marriage within the territory of a totally different kind. 'We have in England no law framed on the scale of polygamy, or adjusted to its requirements' (p. 136). 'All that is intended to be here decided is that as between each other [the spouses] are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England' (p. 138).¹

It is, indeed, a little misleading to say that a polygamous marriage is not recognized in England—at all events for purposes other than the application of the matrimonial law. It is difficult to believe that a Mahomedan wife ceases to be a wife merely because she happens to be temporarily in England. American Courts have expressed strong opinions to the contrary.² The wife cannot, it is

¹ In parts of the Empire where domiciled subjects (Chinese) may lawfully have secondary wives, the issue of these wives or concubines are recognized by the Privy Council as legitimate for purposes of succession: *Cheang Thye Phin v. Tan Ah Loy*, [1920] A.C. 369; *Kho Hooi Leong v. Kho Hean Kwee*, [1926] A.C. 529.

² 'If', said Ware J. in *Polydore v. Prince* (Beale's Cases, at p. i. 741), 'a Turkish or Hindoo husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal pre-eminence

true, go to an English Court for the enforcement of matrimonial duties or for relief from matrimonial obligations; but it is apprehended—though with diffidence, in the absence of authority—that if, while she was in England, any person wrote or said that because she was not married in the Christian sense she was no true wife but an immoral woman living in fornication with a man not her husband, she would have a good cause of action for libel or slander in an English Court. Or again, is it conceivable that a Mahomedan married to a wife of, say, fourteen years would be liable in this country for carnally knowing his wife, under the Criminal Law Amendment Act, 1885? Yet this result would seem to follow if his married status is in no way recognized by our law.

Our discussion, so far as it concerns status and capacity in Private International Law, seems to have led us to this position: status is, and must be governed by the *lex domicilii*. Within his own community, as soon as a person's status is determined, the capacities and incapacities attendant upon it follow automatically, as of course. Outside his own community—or, at all events, in England, for the rule differs in other countries—his status remains unaffected; he is never divested of it while he retains his domicile; but effect may or may not be given to the capacities and incapacities attendant upon it, according to the policy of the law in the country where he seeks to perform juristic acts.

of the husband as to acts done here, would be admitted only to the extent that the marital rights are recognized by our laws, and not as they are recognized by the law of his domicile.' (The latter part of the dictum is undoubted: see Dicey, Rule 141.) Dicey is therefore scarcely accurate in saying (p. 290, note (c)) that the dictum of Ruffin C.J. in *Williams v. Oates* (5 Iredell 535) is 'isolated'. Ruffin C.J. said: 'If a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home': cited and doubted by Wharton, s. 130. It is certain that jurisdiction in separation and restitution of conjugal rights will be exercised independently of the *lex domicilii*: *Armstrong v. A.*, [1898] P. 178; *Graham v. G.*, [1923] P. 31; but whether it would be exercised by English Courts in relation to a polygamous marriage does not appear to be settled.

THE JUDGE AS MAN OF THE WORLD¹

THREE recent cases of libel, noteworthy, if on no other account, for their sharp differences of judicial opinion, illustrate the extreme fluidity of the law of innuendo and the somewhat equivocal relationship between judge and jury in matters of defamation.

'What a reasonable man would reasonably infer from the words' resolves itself, in the last analysis, into what a reasonable judge will reasonably infer from the words. Since that question depends upon the individual judge's knowledge of the world, of everyday circumstances, and of everyday language, differences of judicial opinion in this branch of the law will probably never cease. It is not without significance that in the leading case of *Capital & Counties Bank v. Henty*² six judges thought the circular which was complained of to be incapable of a defamatory meaning, and five judges thought the contrary.

In *Tolley v. Fry*³ Scrutton L.J., after long years of experience, confesses his inability to decide how far the law permits a judge to be a man of the world. 'It is difficult to know what judges are allowed to know, though they are ridiculed if they pretend not to know. A jury is certainly allowed to know something not in the evidence when they are constantly told to use their knowledge "as men of the world" in interpreting the evidence.'

Whether or not strict legal theory openly avows it, it is certain that our Common Law would have stood still if judges had not behaved as men of the world, or, to use Chief Justice Cardozo's phrase, as 'interpreters of the social mind'. To what extent judges do and must determine questions of law by 'something not in the evidence'—i.e. by something in their own daily experience and observation—will be realized by reference (to take one example from many) to the judgement of Atkin L.J. in

¹ *Law Quarterly Review*, xlv. 151.

² (1882), 7 App. Cas. 741.

³ [1930] 1 K.B. 467.

the case of *Vosper v. Great Western Railway Co.*¹ It is manifest in every sentence that the Lord Justice was there speaking, not only as a learned lawyer, but as an experienced railway passenger. And it is not only in railway trains that just judges travel: they are frequently passengers on the Clapham omnibus.

'Questions of mixed law and fact' and questions as to whether there was 'any evidence to go to the jury', are in reality questions of fact only—fact seen by the eyes of the judge as a kind of super-juryman. Nobody is deceived by the fiction that the judge is stating, not what he himself thinks, but what he thinks an average reasonable man might think. How can his opinion, by whatever formula it is described, be anything but subjective? How can he measure the reasonableness of the average man except by the standard of his own reasonableness? And how curious a paradox it is that—as sometimes happens—when twelve average reasonable men and women *have* found that there is sufficient evidence before them, a superior Court holds that there was not sufficient evidence upon which they *could* find what they have found! Clothe it in whatever politenesses you will, the only true meaning of this corrective process is: 'You, members of the jury, are not average reasonable men; we, on the other hand, *are*.' And, with the greatest respect to the ancient and honourable institution of the jury, *so they are*. Generally.

The question of 'law' in *Tolley v. Fry* may be stated thus: Would the average reader, seeing a caricature of a well-known amateur sportsman in an advertisement for a popular sweetmeat, reasonably (not *conceivably*) infer that the sportsman had been paid to constitute himself 'a source of innocent merriment', thereby profaning the dignities and the decencies of 'amateur status'? The majority of the Court of Appeal held that the inference was too fanciful. This guilelessness of mind has never, if we may say so with respect, been a weakness of Scrutton L.J., who dissented.

¹ [1928] 1 K.B. 340.

A few reflections suggest themselves:

(1) The innuendo alleged did not reside in the words themselves. It was not even lurking in them, cunningly concealed. An imputation of fondness for chocolate can scarcely hold the eater up to public ridicule, hatred, or contempt. Mr. Tolley complained not of what was said, but of the circumstances in which it was said. It is easy to imagine many cases in which the circumstances surrounding the publication of a statement innocuous *per se* may make it the reverse of innocuous; and yet it is curious that there appears to be very little authority upon this kind of twice-removed innuendo. Only one case, and that not very well known—*Dockrell v. Dougall*¹—is cited on this point.

(2) The defendants, manufacturers of the chocolate, in their correspondence with the agents who concocted the advertisement, showed clearly that they were apprehensive of the very kind of objection which the plaintiff took to their conduct; so apprehensive that they even sought, without success, to obtain from the advertising agents an indemnity against possible actions of libel. Scrutton L.J., differing on this point from Greer L.J., attached much importance to this circumstance *as evidence that the cartoon was capable of conveying a defamatory meaning to reasonable minds*; for it is a curious feature of the case that there was no direct evidence before the Court that prominent persons were in the habit of allowing their names to be used in advertisements for purposes of gain. But it does not follow, nor does Scrutton L.J. suggest, that the defendants' sense of guilt could in itself be a decisive factor against them. There was here no question of malice or state of mind. If a man may be guilty of libel without intending to commit it (as *Hulton v. Jones*² shows), so he may be guiltless of libel although he intends to commit it or suspects that he may commit it, if in fact his statement is not defamatory in the view of the reasonable third person. As is pointed out by Slessor L.J., approving and adopting

¹ (1900), 80 L.T. 556.

² [1910] A.C. 20.

Bower on Defamation, in order to prove 'defamation in a secondary sense', it is necessary to show not only knowledge of special extraneous facts on the part of the defendants, but 'similar knowledge on the part of the class of persons to whom the matter is published', together with a further knowledge on the part of the defendants that the class will be acquainted with the special circumstances. We venture to think that the plaintiff in this case never satisfactorily established 'similar knowledge on the part of the class of persons to whom the matter is published'.

(3) It is further pointed out by Slessor L.J. that the defendants' apprehensions might have been based on a mistaken view of the law. 'It may well be that the defendants and the advertising agents, ignorant of the decision in *Dockrell v. Dougall* and other cases that the bare unauthorized use of a name is not actionable without more, may have thought that an unauthorized use of the plaintiff's name would equally be illegal.' Unfortunately, it is not so. *Tolley v. Fry* emphasizes a hiatus in our law to which attention has often been called. All the Lords Justices were agreed that there was *damnum*, and they deprecated the conduct of the defendants in emphatic terms. The only question was whether the *damnum* was *iniuria datum*. The majority held that it was not. Once again the 'right of privacy' is repudiated as a cause of action in English law, unless (as in such a case as *Hickman v. Maisey*¹) it can shelter itself under the wing of trespass or nuisance. Will this very substantial right always remain unrecognized and unprotected?²

(4) That the jury regarded the right as substantial and the injury as serious is shown by the damages—£1,000. All the members of the Court of Appeal considered this amount excessive, though, in the view which the majority took, the question did not arise expressly for decision.

¹ [1900] 1 Q.B. 752.

² See A. L. Goodhart, 'Recent Tendencies in English Jurisprudence', in *Canadian Bar Review*, vii. No. 5, and P. H. Winfield, H. C. Gutteridge and F. P. Walton on the 'Right to Privacy', *L.Q.R.*, xlvii. 23, 203.

Here again Scrutton L.J. confesses the difficulties of the judge, striving to be at the same time a man of the world, in arriving at any satisfactory standard; and he cites the somewhat satirical and highly experimental methods by which Hamilton L.J., in *Greenlands v. Wilmshurst*,¹ convinced himself that the damages were excessive. Is it possible that super-jurymen are influenced in this matter by the fact, well known to them, that sub-jurymen, however average and reasonable, are apt to make large and prosperous business concerns pay very dearly for their sins? However this may be, we venture to submit, with the greatest respect, that £1,000 is not too heavy a penalty to pay for conceiving and publishing a 'Limerick' so devoid of gaiety, wit, or prosody as the following:

The caddy to Tolley said, 'Oh, sir!
 Good shot, sir, that ball see it go, sir!
 My word, how it flies,
 Like a cartet of Fry's,
 They're handy, they're good and priced low, sir!'

£200 per line seems a very fair estimate.

The case of *Watt v. Longsdon*,² again illustrates the difficulties of the judge in his capacity as super-jurymen. 'Moral and social duty' has always been an ill-defined part of the Common Law, for the excellent reason that it is indefinable; and of all real or supposed social duties none, surely, is more delicate than that of 'coming between man and wife'. The problem is to find the just medium between altruism and discretion; and, as Scrutton L.J. says, it is a problem which must be determined by the judge 'without any evidence, by the light of his own knowledge of the world, and his own views on social morality, a subject-matter on which views vary in different ages, in different countries, and even as between man and man'. Little wonder, then, that here again we find *quot indices, tot sententiae*; and Scrutton L.J. calls attention, with an almost despairing resignation, to the differences of judicial

¹ [1913] 3 K.B. 507.

² [1930] 1 K.B. 130.

opinion which existed even in the *locus classicus*, *Stuart v. Bell*.¹ The Court in *Watt v. Longsdon* carefully avoids any appearance of laying down a general rule as to the right or the duty of a third person to 'communicate to husband or wife information he receives as to conduct of the other party to the marriage. I am clear', says Scrutton L.J., 'that it is impossible to say he is always under a moral or social duty to do so; it is equally impossible to say he is never under such a duty.' All that is decided is that in the particular circumstances of this case (which need not now be recounted) the defendant was under no moral or social duty to convey to the plaintiff's wife defamatory and untrue allegations against her husband. But while no general rule is (or can be) laid down, we do not think that the decision will encourage officious persons to carry tales to husbands or wives.

One doubt is removed by the case. A dictum of Lindley L.J. in *Stuart v. Bell* seems to suggest that the moral or social duty of the person making the communication, and the interest of the person receiving it, are *alternative* grounds of privilege; and in consequence, conflicting statements on this point have found their way into the text-books. *Watt v. Longsdon* lays down that the duty on the one side and the interest on the other must exist concurrently in order to establish this particular kind of privilege. Here the wife clearly had an interest in receiving the communication, which, among other things, reflected upon her husband's fidelity; but it was held that in the circumstances the defendant had no duty to make it. *Quoad* fellow-members of the plaintiff's business, however, duty and interest were present as correlatives, for the charges included such matters as drunkenness and dishonesty. *Quaere*, whether it might have been otherwise if they had been confined to sexual immorality?

*Cassidy v. Daily Mirror Newspapers, Ltd.*² raises more important and more far-reaching questions than either of the two preceding cases. A newspaper makes, *with Mr.*

¹ [1891] 2 Q.B. 341.

² [1929] 2 K.B. 331.

X's express authorization, the statement that Mr. X is engaged to be married, and therefore, by inference, that he is an unmarried man. The announcement causes in the minds of certain witnesses very natural questionings as to the status of the lady who is known to the world as Mr. X's wife, and of whom there is no evidence that the defendants have ever heard. For this indirect aspersion, for which Mr. X is largely responsible, on Mrs. X's propriety, the newspaper has to pay £500 and costs. On the authority of *Hulton v. Jones*,¹ it is irrelevant whether the defendants did or did not know of the existence of Mrs. X, once it is shown that she was in fact injured. Greer L.J., however, in dissenting, distinguished that case on the ground that the statement there complained of was *ex facie* defamatory, whereas in *Cassidy* it was *ex facie* innocent, and became defamatory, if at all, only through an innuendo for which the learned Lord Justice considered that the defendants could not be held responsible. Sir Frederick Pollock² has found himself unable to draw this distinction, and is of opinion that the principle of *Hulton v. Jones*, whether we like it or not, logically leads to the result in *Cassidy's Case*. Doubtless the distinction drawn by Greer L.J. assumes that on the face of the statement 'Artemus Jones' would be reasonably understood by the ordinary reader to be an actual and not a purely fictitious person. If, as many readers might suppose from the whole tone of that famous effusion, Artemus was a mere figment, the statement could not be defamatory *ex facie*, since it is impossible, we apprehend, to defame that which has no existence. In the peculiar facts of *Hulton v. Jones*—facts which at several points show that the defendants certainly ought to have known of the existence of the real Artemus Jones—the decision was no doubt sound justice, apart from its soundness in law, which it is not open to us to question. Nor is there anything harsh or inelegant in its *ratio decidendi*, viz. that a statement *prima facie* defamatory (assuming this) which may be and is in fact reasonably

¹ [1910] A.C. 20.

² *L.Q.R.* xlv. 1.

understood to refer to an actual person is none the less defamatory because the defendant did not mean it to be as libellous as it actually was. The 'liability without fault' here (even assuming that it *was* entirely without fault in *Hulton v. Jones*) is no more startling or inexpedient than many cases of liability for conversion, trespass, or nuisance, not to mention liability under *Rylands v. Fletcher*. But it is carrying the Artemus Jones principle a long way to say that because the defendant has, in good faith and with X's permission, made an apparently innocent statement about X, which may possibly reflect upon Y, a person of whom the defendant has never heard, the defendant is liable to Y. The examples which Greer L.J. gives¹ of the possible results which might flow from this doctrine are very striking and, we respectfully suggest, not at all fantastic. If it is urged that the defendant, though he did not in fact know of the existence of Y, was under a duty to discover it at his peril, this surely is a hard saying. If A authorizes B to make an innocent and, so far as B knows, true statement about A, it is extending liability very far to say that B is under a duty to check the accuracy of A's statement with a view to calculating its possible effects upon unknown third parties—at all events, if there are no circumstances which ought to have put B upon inquiry.

If this decision affected only newspapers, many persons, apart altogether from its technical aspects in law, would regard it with satisfaction rather than alarm. We are all aware of a prevalent type of journalism which habitually traffics in insinuation. One's natural sympathy, therefore, would be with the observation of Scrutton L.J.²:

'If publishers of newspapers, who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry as to their truth, in order to make their paper attractive, they must take the consequences, if on subsequent inquiry their statements are found to be untrue or capable of unjustifiable and defamatory inferences.'

¹ [1929] 2 K.B. at p. 348.

² *Ibid.* at p. 341.

One cannot repress a certain satisfaction even when, as has happened recently, convicted criminals have made newspapers pay heavily for the privilege of debauching the minds of their readers with false and perfervid accounts of the criminal's career of infamy. But unfortunately *Cassidy's Case* is not confined in its effect to the baser sort of journalism. As Greer L.J. points out, with some solemnity¹:

'If the decision of my brethren in this case is right, it would be right to say that I could be successfully sued for damages if, having been introduced to two apparently respectable people as persons engaged to be married, I repeated that statement in a letter to a friend, on the ground that my words meant that a lady totally unknown to me, who was in fact the wife of the man, was not his wife and was living in immoral intercourse with him.'

Reputation in this country is jealously guarded, but need it be guarded quite as jealously as this?

There is a further curious result. Can the husband be said to have procured the publication by assenting to it at the request of the defendants? If so, it appears to follow that Mr. Cassidy (or Corrigan), by authorizing the announcement, became a publisher of it and is a joint tortfeasor with the defendants.² In other circumstances the plaintiff might therefore have sued him, in the improbable event of her wishing to draw upon his funds rather than upon those of a wealthy corporation. But *scilicet* as Mr. Corrigan (or Cassidy) is the plaintiff's husband, no action lies against him. We thus have the curious position that the plaintiff, who has been wronged by two persons jointly, can sue only one of them; and in this peculiar instance, to which, so far as we know, there is no exact parallel, we must lop off one branch of the rule that 'a person whose legal right is injured by a tort so committed' (i.e. by several persons jointly) 'has a right of action against *any or all* of such joint tortfeasors.'³ And what is the husband's

¹ *Ibid.* at p. 350.

² *Parkes v. Prescott* (1869), L.R. 4 Ex. 169.

³ Halsbury, *Laws of England*, xxvii. para. 955.

liability, if any, to the defendants? Clearly, if both publishers knew the statement to be defamatory, there can be no contribution or indemnity between them, even if it has been previously agreed upon¹; but can the defendants bring themselves within the principle of *Adamson v. Jarvis*² so as to claim indemnity from the husband? If the statement were prima facie defamatory, they could not do so; but in this case the defendants have done, with the consent of the husband, what was prima facie lawful. It is a common clause in publishers' contracts that the author shall indemnify the publisher against an unwitting libel. But in *Adamson v. Jarvis*, the plaintiff, an auctioneer, was acting simply as an intermediary under the instructions of the defendant; and it is doubtful whether it could be said that merely because Mr. Cassidy acceded to the defendants' request to publish the statement, he became principal and the defendants became agents. The unsatisfactory result seems to follow that of the two publishers of a libel, the one who had the means of knowing that the apparently innocent statement was defamatory is the one who escapes scot-free.

Postscript. The majority decision of the Court of Appeal in *Tolley v. Fry* was reversed by the House of Lords, [1931] A.C. 333, which held, by a majority, that the defendants' advertisement was capable of bearing the innuendo attributed to it by the plaintiff. A new trial, limited to the assessment of damages, was ordered.

¹ *Smith v. Clinton* (1908), 25 T.L.R. 34.

² (1827), 4 Bing. 66.

THE PHLEGMATIC ENGLISHMAN IN THE COMMON LAW¹

IN many problems of English Law the last word rests with an obscure person who is known to the law by a number of undistinguished titles. Lord Justice Bowen once called him 'the man on the Clapham omnibus'. Sometimes he is personified as John Doe or Richard Roe or John Styles, but more commonly nowadays simply as 'the reasonable man', 'the average man', or 'the ordinary man'. Perhaps the last title suits him best, for the quality which endears him most to judges is his imperturbable ordinariness.

Lawyers have to consider many aspects of his character. Here we are concerned only with one—his emotions and his sensibilities. They are 'English to the backbone'.

We shall expect to find him phlegmatic; but his British phlegm has a very distinct admixture of choler. Our law looks askance at provocation; it is at most not a defence but an extenuation. For example, we know nothing of the 'unwritten law' which wholly justifies revenge upon adultery, 'the highest invasion of property', as it is called, somewhat materialistically, in an old case.² But 'wild justice' done upon the love-thief has from early times been recognized as a powerful extenuation of homicide, provided that it be done in the heat of blood and not as a calculated retribution;³ and it is notorious that with many juries it is practically equivalent to a defence. But John Styles must not be quick to wrath. Names will never hurt him, and he is not justified in retorting with a deadly blow to a mere insult, however grievous.⁴ Sticks and stones are a different matter. Lay a finger on him, and he is, like Fluellen, 'hot as gunpowder'; his aggressor must not be

¹ *Cornhill Magazine*, Sept. 1924.

² *R. v. Mawgridge* (1707), Kelyng 119, 137.

³ 1 Hale P.C., c. 31, s. 36; *Maddy's Case* (1683), 1 Vent. 158.

⁴ 1 Hale P.C., 456 f.

surprised if he is made to eat the leek, skin and all, to the accompaniment of bloody coxcombs.

Some of the old cases carry this kind of provocation to a great length. Perhaps the most remarkable is one recorded by Foster in his *Crown Cases*, from a manuscript report of a trial at the Old Bailey in 1704:

'There being an affray in the streets, one Stedman, a foot-soldier, ran hastily towards the combatants. A woman seeing him run in that manner cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you ——?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled, and Stedman pursuing her stabbed her in the back. Holt was at first of opinion that this was murder, *a single box on the ear from a woman not being sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear.*¹ And it was proposed to have the matter found special.² But it afterwards appearing in the progress of the trial that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was held clearly to be no more than manslaughter. The smart of the man's wound and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.'

At the present day, it can hardly be supposed that even a blow in the face with an iron patten would extenuate this brutal butchery. Manners have to some degree improved, it is to be hoped; possibly not because of an improvement in the common clay of Styles, but because he no longer carries a lethal weapon at his side. The readiness and ferocity with which swords were used when they were a common article of apparel is illustrated by the case of *The King v. Tranter and Reason* in 1772:³

'Mr. Lutterel being arrested for a small debt prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the Attorney's bill, in order, as Lutterel pretended,

¹ Italics in the original.

² i.e. a special verdict of homicide in self-defence, which at this period meant a pardon as a matter of course, but nevertheless involved forfeiture of property.

³ 16 St. T. 1; Foster, *Crown Cases*, 292.

to have the debts and costs paid. Words arose at the lodgings about *Civility Money* which Lutterel refused to give; and went upstairs pretending to fetch money for the payment of debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which at the importunity of his servant he laid on the table saying, *He did not intend to hurt the officers, but he would not be ill-used.* The officer who had been sent for the Attorney's bill soon returned to his companion at the lodgings, and words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him, one stabbed him in nine places, *he all the while on the ground begging for mercy and unable to resist them.* And one of them fired one of the pistols at him *while on the ground* and gave him his death wound. This is reported to have been manslaughter *by reason of the first assault with the cane.*¹

From which it would appear that a blow with a cane is sufficient provocation for a murderous assault, two against one, with swords and pistols. But this is going much too far even for the eighteenth century. Foster, who reports the case, is dissatisfied with it, and explains that on an examination of the evidence it appears that there was some ground for thinking that Lutterel was the aggressor, or at all events the threatener, with his sword.

It is clear from many old cases that the Courts were disposed to regard leniently the escapades of revellers who, flown with insolence and wine, made too free use of their swords. The kind of quarrel which might arise from a trivial occasion and lead to fatal results is illustrated by the trial, in 1688, of Walters, Bradshaw, and Cave for the killing of Sir Charles Pymm.¹ The deceased had gone to dine with some friends at the Swan Tavern, Fish-street-hill, where Walters and his friends were also dining. One party was upstairs and the other downstairs; one had beef and the other fish. One of Walters' party coveted the beef of the other diners, and a member of Pymm's party, apparently as a voluntary courtesy, sent up a plate of the meat, but ordered it to be charged to Walters. Walters'

¹ 12 St. T. 114.

companions sent their thanks and drank the healths of the other party, who were entire strangers to them. Why the general good feeling was suddenly changed to anger does not appear; possibly it was because Walters did not realize until the bill was presented that he was to pay for the beef. At all events, when the two parties met in the entry to the tavern, an inquiry as to how they had enjoyed the beef led to sharp words from Walters and his friends, who by this time had drunk 'ten bottles among six'. Bradshaw, of Walters' faction, fell violently upon Pymm, who, however, got away into the street; but Walters followed him with threats and drawn sword. According to Walters' own account, he was himself wounded in the thigh, and it is not clear from the report who struck the first blow; but there is little doubt who was the aggressor, even though Pymm may well have struck first in self-defence. Walters ran him through, and, as he fell, took him by the nape of the neck, crying '—— ——— you, you are dead', and beat his head upon the pavement. In the same ferocious frame of mind, when his attention was called to the sword sticking in his victim's body, his only remark was, '—— ——— him, let it stay in his guts'.

The lenience with which the judges viewed the 'frolic' of these vulgar roysterers will sound strange to modern ears. The words of Mr. Baron Jenner read almost like an apology for the prisoner's sprightly manners. He said, in charging the jury: 'The next step is, here is nothing that can impute a general malice upon Mr. Walters; for if I had no design to kill a man, and kill another with whom I do not quarrel, that cannot be any premeditated malice; but I rather think there was a little heat of wine amongst them; and this whole action was carried on by nothing else but a hot and sudden frolic, and I am very sorry that it should fall upon such a worthy gentleman as he was. And if there was no malice premeditated, then can he be found guilty of nothing but manslaughter.' The jury, unable to reconcile the direction in law with their own view of the prisoner's conduct, returned to Court, and

expressed it as 'upon their conscience' that Walters, by his savage conduct, had shown a deliberate intent to kill; and they were plainly prepared to find him guilty of murder. But the Court in solemn language put them upon their oaths as jurors to find the accused guilty only of manslaughter, and they returned a verdict accordingly, though with evident reluctance.

Violence done to a man's kith and kin is almost as dangerous as violence done to himself. Defence of family and property fall within the same category as self-defence;¹ and one case at least, in 1612, seems to show that the sight of his son's bleeding nose may arouse primitive passions in the breast of John Styles. It is reported by Coke:²

'Two boys combating together, and one of them was scratched in the face, and his nose voided a great quantity of blood, and so he ran three-quarters of a mile to his father, who, seeing his son so abused, and the blood run from him, and his cloaths and face all bloody, he took in his hand a cudgell, and went three-quarters of a mile to the place where the other boy was, and struck him upon the head, upon which he died. And this was held but manslaughter, for the ire and passion of the father was continued, and there was no time that the law can determine that it was so settled, that it shall be adjudged in law malice prepense.'

Foster³ disapproves of the decision as reported, and explains it on the ground that the father used only 'a little cudgell', intending to chastise, but no more. The decision as it stands is certainly barbarous according to modern notions.

Though provocative words do not excuse a blow, they may be expected to draw a retort. If charges are made against a man, and rebuttal involves a counter-defamation

¹ 2 Inst. c. ix. 316; 3 Salk. 46; 3 Bl. Comm. 3: 'For the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself or those to whom he bears a near connexion) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain.'

² *Rowly's Case*, 12 Rep. 87; 1 Hale P.C., 453; 1 Hawk. P.C., c. 31, s. 37.

³ Following Croke, who reports the case, Cro. Jac. 296.

upon the accuser, this is an occasion of qualified privilege.¹ If, however, he is merely provoked by antecedent libels to publish counter-libels which have no relevance to the original charge, this is no defence, though it may be a mitigation of damages.² That provocation is highly important in the law of defamation is shown by the now somewhat unprofitable distinction between civil and criminal libel. The latter is based on the notion that it is calculated to cause a breach of the peace; hence Lord Mansfield's aphorism, 'the greater the truth the greater the libel', though it startled his contemporaries, was fully true until the passing of Lord Campbell's Act in 1843,³ which made truth a defence in criminal libel, provided that it could be shown that the defamatory statement was not only true but in the public interest. May we not see in the old theory a relic of duelling days? The more true the defamation, the more likely it was to provoke reprisals. When Styles wore a sword, it was expected of him by society that he should challenge his traducer to personal combat. On the Continent to-day, in certain classes of society, the same standard prevails. But in England Styles has long given up these notions of 'honour'. Detractors are not often horsewhipped, and argument by fisticuffs is a privilege reserved to Members of Parliament. It is absurd to say nowadays that a libel imports a danger of bloodshed, and the law would suffer no great loss if the distinction between civil and criminal libel were wholly abolished.

In all these matters it will be seen that Styles is no craven, to take an injury meekly. The Christian precept of turning the other cheek finds no place in our law. And being no craven, the average man is expected to show a certain degree of 'firmness and courage' in situations of difficulty.

¹ *Laughton v. Bishop of Sodor and Man* (1872), L.R. 4 P.C. 495; cf. *Adam v. Ward*, [1917] A. C. 309.

² *Finnerty v. Tapper* (1809), 2 Camp. 72, 76; *Tarpley v. Blabey* (1835), 7 C. and P. 64, *per* Tindal C.J.

³ 5 Inst. 125; 4 Bl. Comm. 150, and Christian's note thereto.

Suppose three or more persons assemble near him to carry out a common purpose in a forcible manner: will he be dismayed? If he is, then the assembly becomes a riot or rout: if he is not, then the assembly may be unlawful, but it is not a riot subject to the special rules applicable to that offence.¹ A riot, in law, must be *in terrorem populi*, which means simply *in terrorem Iohannis Styles*.² What is a reasonable cause for alarm in this firm and courageous man? The presence of dangerous or unusual weapons, 'the show of armour, threatening speeches, or turbulent gestures':³ even the presence of an entirely good-humoured but high-spirited crowd, who, in rejoicing at the declaration of peace, are determined to have fuel for bonfires, if necessary at the cost of demolishing adjoining property.⁴ But if the good-humoured crowd assembled merely to halloo at Styles, or to jog his elbow facetiously as he sat writing, he must preserve his sense of humour, he must not fly into a rage—'for the purpose must be unlawful'.⁵

The degree of firmness and courage demanded of Styles is not excessively high. 'You have no right', says James L.J.,⁶ 'to expect men to be something more than ordinary men.' If you suddenly confront Styles with an unforeseen danger, you cannot expect him necessarily to act with perfect *sang-froid*. It may very well be a venial error of judgement, for example, to port instead of starboarding his helm when a collision is suddenly threatened through no fault of his own.⁷ Of course he must not give way to mere panic; the reasonable apprehension which causes him to act precipitately is the *metus non vani hominis, sed*

¹ Stephen, *Dig.*, Art. 75; *R. v. Cunningham Graham* (1888), 16 Cox C.C. 420; *Field v. Receiver of Metropolitan Police*, [1907] 2 K.B. 853; *Ford v. Receiver of Metropolitan Police*, [1921] 2 K.B. 344; *London and Lancashire Fire Insurance Co. v. Boland*, [1924] A.C. 836.

² *R. v. Solely* (1707), 11 Mod. 100; *R. v. Langford* (1842), Car. and M. 602, 605. ³ 1 Hawk. P.C., 65, s. 5.

⁴ *Ford v. Receiver of Metropolitan Police*, *ubi sup.*

⁵ *Per* Lord Holt, *R. v. Solely*, *ubi sup.* But is not jogging a man's elbow intentionally and against his will unlawful?

⁶ *The Bywell Castle* (1879), L. R. 4 P.D. 219, 223.

⁷ *Ibid.*

*qui merito et in homine constantissimo cadat.*¹ When he is confronted with two evils, he cannot be blamed if by bad judgement he chooses the greater: such evils, for example, as remaining upon the top of an apparently overturning coach, or making a jump for it²; leaving his horses, which he wishes to take out to water, in the stable, or leading them out across a risky but apparently passable ditch which has been wrongfully dug by another³; being carried in the train beyond his destination, or getting out at a stopping-place which is plainly inadequate, but which is the only one available.⁴ And he will be excused for choosing the worse alternative, if it merely *seemed* the better, though it was not so in fact; and for doing damage in emergency which *seemed* justified by necessity though the event proved it to be otherwise—e.g. damaging property to prevent the spread of fire, though it turned out that the fire could have been checked without such damage.⁵

As for his sensibilities, the law considers Styles to be, if not quite pachydermatous, at least protected by a hide of serviceable toughness. He is not a neurotic who will shrink and wither at every aspersion cast upon him. His back is broad enough to bear a normal amount of hostile criticism; and therefore he cannot claim damages for 'mere pain of mind', if he chooses to fret unduly about such criticism, or even abuse.⁶ This is the rule however exalted his reputation may be, and however tender he may be of it. All persons being equal before the law, it is as much a wrong to defame a navvy as a Cabinet Minister. The Romans had a different rule, and freely awarded damages proportionately to the dignity of a man's social standing (*ex dignitate*).

¹ D. 4. 2. 6.

² *Jones v. Boyce* (1816), 1 Stark. 493.

³ *Clayards v. Dethick* (1848), 12 Q.B. 439.

⁴ *Robson v. N.E. Ry. Co.* (1875), L.R. 10 Q.B. 271; *Rose v. Same* (1876), 2 Ex. D. 248.

⁵ *Jones v. Boyce, ubi sup.*; *Cope v. Sharp*, [1912] 1 K.B. 496.

⁶ *Allsop v. A.* (1860), 5 H. and N. 534; *Lynch v. Knight* (1861), 9 H.L.C. 577.

But in this matter practice hardly squares with the strict theory of equality before the law.

What is the substance of the complaint when a man claims damages for injury to reputation? What is the nature of the damage alleged? The law of 'special damage' in slander—i.e. spoken as opposed to written defamation—has furnished some strange doctrines on this point. The law exactly reverses the principle 'who steals my purse steals trash', &c. He who filches Styles's good name has done him no injury in law unless he has inflicted some 'material damage'. What is this material damage? The Courts and the public have been edified from time to time by the spectacle of counsel proving that their defamed clients have lost 'trash' in the shape of thus much tea and bread-and-butter which has been denied them because uncharitable friends have ceased to invite them to their houses. A man verbally slandered may claim for the loss of free meals, but not for mere loss of reputation as such. Loss of *consortium vicinorum*, loss of spiritual advantages, stigma in social clubs and circles, general social reprobation, and all the unhappiness of being 'sent to Coventry'—these are as naught; but a falling-off in invitations to dinner is a great matter.¹ Before the passing of the Slander of Women Act, 1891, judges constantly referred with regret amounting to indignation to the fact that a woman whose chastity had been falsely impugned by spoken words had no remedy unless she could prove 'special damage'. Yet if the defamation takes a written instead of a spoken form, injury to reputation is in itself a sufficient head of damage.² It cannot be pretended that this is a very satisfactory distinction. It is by no means invariably true that the written is more damaging than the oral defamation; for the latter, passed from lip to lip, whispered in corners,

¹ *Moore v. Meagher* (1807), 1 Taunt. 39; *Roberts v. R.* (1864), 5 B. & S. 384; *Davies v. Solomon* (1871), L.R. 7 Q.B. 112; *Chamberlain v. Boyd* (1883), 11 Q.B.D. 407.

² As it is also in malicious prosecution; see *per* Lord Holt, *Savile v. Roberts* (1699), 1 Ld Raym. 374, 378.

and ever increasing snowball-fashion, may be more dangerous, because more insidious, than the printed lie which can be 'nailed down'. But even if it is considered that there should be a difference in the degree of damage, there should not be a difference in the kind. The substance of the action in both cases clearly is injury to reputation. And, artificial distinctions apart, the *gravamen* of injury to reputation is that it derogates from the esteem in which a man is held. Loss of esteem *does* involve pain of mind in any ordinary healthy person, and it is perfectly right and just not only that reputation should be vindicated, but that a person who has been unjustly attacked should be compensated for what he has suffered in mind by the attack. To limit his suffering to mercenary loss is an excess of materialism which results from the law's over-cautious dread of the abstract.

Juries, who invariably play a part in defamation cases, are under no misapprehension in this matter. They are accustomed to award damages according to the actual loss of esteem which the plaintiff has suffered, and in the jury-room they must often make merry over the Judge's distinctions between cups of tea and pain of mind. Normally, this will mean that damages are in fact awarded *ex dignitate*. The higher the plaintiff's position in society, the more likely he is to suffer from scandal, and the higher his damages will be—especially if the action is against a newspaper. If, on the other hand, the plaintiff's position in society is humble and obscure, the esteem of society is *pro tanto* a less important matter, and the difference will reflect itself in the amount of damages. This, no doubt, is a heresy against the principle of equality before the law; but if any reader doubt it, let him publish simultaneously a libel on the Prime Minister and on the village grocer, and see how he fares. Of course it is not invariably so; a jury is sometimes aware that it may be quite as serious a thing for plain John Styles to be an outcast from the society of Clapham, as for the Rt. Hon. John Styles to be blown upon by one of those breaths of scandal which drawing-

rooms and smoking-rooms alike are always preparing for him. But, on the average, the difference in social importance and prestige will roughly correspond with the difference in the actual injury done. Styles is a self-respecting Englishman, and it is a grievous thing to deprive him of the esteem of his neighbours and of *himself*. At one time, when he wore a sword or carried a quarter-staff, he vindicated his own honour by the ancient method of self-help; to-day all the forces of the law are constantly engaged, often indeed too busily engaged, in maintaining his good name and his self-respect. He is law-abiding, but distinctly touchy. In Shakespeare, his name is Private John Bates.

Much as it dislikes the abstract notion of 'pain of mind', the law has not been able to exclude it in at least one form of civil injury. Damages awarded to a parent for the seduction of a daughter are frankly given for 'injured feelings' or 'family reputation'—it makes no matter which, for they are the same thing. Even here, however, we grudgingly admit the real nature of the damage under the transparent fiction that compensation is given only for loss of the daughter's services in the house.

Pain of mind is also explicitly recognized in regard to Jane Styles, a person of whom it is hard to find a definite conception in the law. It seems clear that in some cases feelings and sensibilities are acknowledged to be more vulnerable in the average woman than in the average man. This is true at least in actions for breach of promise of marriage,¹ apart altogether from the mercenary legal view that a woman by breach of the promise has suffered an injury to her 'prospects of marriage'; and it is a settled rule that a superior court will not review the damages given by a jury in these cases, however excessive and vindictive they may be. Again, it has been held in two striking cases² that

¹ *Smith v. Woodfine* (1857), 1 C.B.N.S. 660; *Berry v. Da Costa* (1866), L.R. 1 C.P. 331.

² *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Fanvier v. Sweeney*, [1919] 2 K.B. 316.

false though not defamatory words and empty threats (for both of which an action does not usually lie), when used to a woman with damaging results, are actionable. In the first case, a foolish practical joker falsely told the plaintiff that her husband had met with an accident and had had both his legs broken. The plaintiff 'became seriously ill from a shock to her nervous system'. In the second case, the plaintiff was a French maid-servant affianced to a German who, in 1915, was interned, and with whom she corresponded. The defendant, in order to induce her to produce certain letters, told her that she had been corresponding with a German spy, which was untrue. As a result, 'she sustained a severe shock and became incapacitated from following her employment, and suffered from neurasthenia, shingles, and other ailments'; and she recovered damages. It may well be doubted whether, if John Styles had been the plaintiff, and had been falsely told that his wife had met with an accident, the law would have considered it a natural and probable result that he should take to his bed; or that under similar threats, he, with his well-known firmness and courage, should suffer from neurasthenia, shingles, and other ailments. It was at one time held that nothing less than actual physical illness, whether in a male or female plaintiff, was enough to support an action for damages; yet who shall say how far mental pain and anxiety are the cause or the effect of many kinds of physical illness?¹

A reasonable degree of stolidity is also expected of Styles in his acceptance of the material surroundings in which he lives. He must not be hypersensitive about the common noises and smells and inconveniences which are inseparable from ordinary dwelling-houses in ordinary

¹ The Infanticide Act, 1922, contemplates the state of mind of a woman after childbirth, and provides that where she 'by any wilful act of omission causes the death of her newly-born child but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof *the balance of her mind was then disturbed*', she shall be guilty of the statutory felony of infanticide, which is to be considered manslaughter and not murder.

localities; for an over-delicate temperament receives little sympathy from the law. 'A nervous or anxious or pre-possessed listener', said Lord Selborne,¹ 'hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded.' And again: 'Neighbours everywhere . . . ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of others.' The standard of comfort and convenience which Styles is entitled to expect is not easy to define, but something like a definition is attempted in a classic dictum of Vice-Chancellor Knight Bruce²: 'Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?' And, we might add, these plain and sober and simple notions must be such as prevail in Clapham. There Styles must not expect, and he certainly will not find, an Arcadian serenity. All that he may reasonably demand is that nobody shall out-Clapham Clapham in noise, smell, dirt, darkness, and the other amenities of suburban life. Within these limits—and they are considerable—his home is his castle; but a castle plain and simple and sober, not one of luxury. His house, for example, is still in 'good tenantable repair', even though the wall-paper be faded and the paint discoloured and the ceiling in need of whitewash.³

Such is *l'homme moyen sensuel* of English Law in one aspect of his composition. It is not as easy as it looks to arrive at a conception of him simply by the light of nature;

¹ *Gaunt v. Fynney* (1872), L.R. 9 Ch. 8, 13.

² *Walter v. Selfe* (1851), 4 De G. and S. 315, 322. Cf. *Adams v. Ursell*, [1913] 1 Ch. 269.

³ *Proudfoot v. Hart* (1890), 25 Q.B.D. 42.

all the reason, observation, and experience of the law have been brought to bear for centuries in constructing him according to what seems the truest English pattern. The study of his characteristics is infinite, especially in that aspect of him with which lawyers are most concerned—his 'sweet reasonableness'. But that is another story.

LEGAL MORALITY AND THE *IUS ABUTENDI*¹

I

INDUSTRY in this country tends to become more and more syndicalized, and one of the consequences is that the already numerous progeny of *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25 continue to increase. Each new judgement leaves the plain man more than ever puzzled as to what 'coercion' in trade really is. Whatever may be the true rule of law, it can hardly be doubted that many of the decisions lend sanction to business methods which fall short of sound commercial morality (for such a thing exists, in spite of familiar clichés to the contrary). It is not suggested that in all the cases in which this question has arisen mere combination and 'pressure' are reprehensible *per se*, either legally or morally. There are even dicta which hint that, in some circumstances, they may be definitely for the benefit of the community.² Nevertheless, it is impossible to read the cases without feeling that 'trade interests' may cover a multitude of sins, from which a business man of scrupulous honour would shrink. In the present state of the law, there is apparently nothing to prevent one powerful trader from commercially assassinating a weaker rival by offering extravagant advantages to other traders, or by issuing to them 'intimations' which, whether they be termed 'threats' or 'warnings', are difficult indeed to distinguish from the pointed pistol. Here, as in not a few cases, the principles of public policy do not concur with those of civil liability; for while the mere fact of combination to crush competition is not in itself a wrong, the agreement so to combine may be, and often is, void as being in restraint of trade.³

These cases raise a question wider than that of legiti-

¹ *Law Quarterly Review*, xl. 164.

² See e.g. Atkin L.J., *Ware and de Freville v. Motor Trade Association*, [1921] 3 K.B. 40, 80.

³ *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, 39.

mate commercial methods. Is there any limit to the exercise of a legally recognized right? Provided that you *have* the right, says the familiar principle of *Allen v. Flood*, [1898] A.C. 1, your motive in the exercise thereof is irrelevant to the law. Keep within the law, and you may gratify your malice to your heart's content. We have come to regard this principle as so indigenous to our common law that it is almost impious to question it. Yet it may be permitted to wonder how long we shall remain content with it—at all events, in the uncompromising form in which it exists at present.

It can hardly be said that the doctrine accords with the ordinary workaday morality of the community. One who blocks up his neighbour's windows or obstructs his view, merely because he has a legal right to do so, has all the meanness and none of the daring of a deliberate trespasser. His frame of mind, indeed, is that of Shylock, and all reasonable men reprobate it. In the dispensing of justice we recognize this principle when we say *summum ius summa iniuria*, but in private legal relationships we give it no place.

Our view is not shared by all our neighbours. Continental systems take a much less lenient view of the *ius abutendi*. For example, Article 226 of the German Civil Code provides: 'The exercise of a right which can have no purpose except the infliction of injury on another is unlawful.' This *Chikanverbot* has, according to a learned writer,¹ been found to be of considerable practical importance.

In Switzerland there are a number of illuminating cases, decided before the new *Code des Obligations* came into force, yet generally held to be not only unaltered but rather confirmed by sections 41 and 48 of the new Code.² We need consider only those which are concerned with trade

¹ Schuster, *German Civil Law*, 68.

² Art. 2 reads: 'Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi. L'abus manifeste d'un droit n'est pas protégé par la loi.'

combination and boycott, since they bear the closest analogy to our English cases.¹ The general effect of the leading cases has been summed up as follows.²

'There are two distinct tests that must be applied to discover whether an act which interferes with another's personal interests is lawful and justifiable or not: first, the purpose or end of the defendant's act must be legitimate, and, to be so, he must either intend to benefit the community or a considerable part of it . . . or, if he is merely acting for his own interests, he must at least not intend to destroy the corresponding rights of the plaintiff . . . And this purpose may often be shown to be illegitimate by proof of the motive behind the defendant's act, so much so that some . . . regard a legitimate motive as another essential altogether. Secondly, the means employed must be legitimate: and here their effect on the plaintiff's position is sometimes taken into account, not merely to determine the extent of the injury, but also the question whether a tort has been committed or not. Specker³ would like to emphasize this second condition, and insists that the means employed cannot be held to be legitimate if they are not commensurate with the object for which they are used. He says . . . that the object or end of an act must be lawful, but this is not enough: the defendant must further take care that he does not employ means which cause injuries to the plaintiff greater than actually necessary for the attainment of that legitimate object: if he does, the act becomes unlawful, however lawful his purpose may have been. . . . A boycott becomes unlawful as soon as it tends completely to ruin the opponent, because this injury would be out of all proportion to the legitimate purpose of the boycotters . . . Specker then combines the two conditions into one by saying that an act that injures another may yet be lawful if it is commensurate with a legitimate purpose.'

In America, judicial practice has varied considerably with regard to the abusive exercise of rights such as those connected with fences and surface or percolating water. In some States the erection of 'spite-fences' merely to annoy a neighbour is disallowed by the Courts, and in Massa-

¹ On the whole subject, see Dr. Ivy Williams, *The Swiss Civil Code*, 95 ff.

² *Ibid.* 100.

³ *Persönlichkeitsrecht im schweizerischen Gesetzbuch.*

chusetts it is forbidden by statute. Though the decisions are not unanimous, the general tendency seems to be that 'a principle of reasonable use has superseded the old and narrow idea that the owner of the surface might do as he pleased'.¹

In French law great battles have been waged upon this subject,² and French legal opinion seems to be evenly divided concerning the juridical basis of *l'abus du droit*. According to one view, every legal right carries in itself its own limitation, and involves a *duty* to use the right properly and innocently. 'Là où apparaît l'abus cesse le droit.'³ The objection urged against this theory is that it makes the standard of legal right too variable and capricious, because it leaves too much to subjective judgement.⁴ Accordingly the opposing school holds that the theory of 'abuse of right' means only that a right which was thought to be unlimited is declared by judicial decision to be in fact limited.⁵ The *intent to injure*, upon which the first school insist as the source of liability, is irrelevant; the Court merely says that this act which was supposed to be rightful was in fact wrongful, and that damages must be paid accordingly.

The second theory certainly leaves many questions unanswered. The discussion may seem academic; but the practical result in French law is a principle very different from that of *Allen v. Flood*. Whereas we adhere to the rigid rule *neminem laedit qui suo iure utitur*, the French posi-

¹ Pound, *The Spirit of the Common Law*, 185. See also *Harvard L.R.* ix. 549, and xxv. 197.

² There is an extensive literature on *l'abus du droit*, well summarized in Planiol, *Traité élémentaire de droit civil*, ii. 280. See also Josserand in Dalloz, *Jur. Gén.* 1908.2.73; Saleilles, *Théorie générale de l'obligation* (1890), 347 (the later edition is not available to the writer); Esmein in Sirey, *Recueil* 1878.1.17; Gény, *Méthode d'interprétation*, § 173; Charmont in *Rev. Trimestrielle* (1902), 113.

³ Josserand, *loc. cit.*

⁴ 'Mais qui serait juge de cette mesure (de l'équité)? Et qui ne voit qu'il se cache sous ces vérités de haute morale une source d'arbitraire et d'empiétement contre la propriété?'—Saleilles, *loc. cit.*

⁵ Planiol, *loc. cit.*

tion—whatever its jurisprudential basis—is well summed up in the words of M. Josserand:

‘Il n’est plus permis désormais aux bénéficiaires de ces droits de se contenter de répondre à ceux qu’ils ont lésés: *Feci, sed iure feci*. La société prétend leur demander compte de l’usage qu’ils font des prérogatives qui leur sont confiées et exercer un contrôle sur les mobiles de leurs actes, même lorsque ceux-ci se présentent comme l’exercice d’une faculté légale.’

It may not be out of place to compare some typical instances from both systems which raise this question.

In *Ware and de Freville v. Motor Trade Association*, [1921] 3 K.B. 40, the defendants were a trade union of manufacturers, formed chiefly for the purpose of maintaining a market price for their goods. Part of the *modus operandi* of the association was to publish in a ‘stop list’ the name of any person who offered, advertised, or sold motor-cars or kindred goods at any other than the ‘maintained’ price. The members of the association bound themselves not to deal with any person whose name was thus proscribed. The plaintiff advertised a car at a price above the maintained price. His name was published in the ‘stop list’, undoubtedly to his great injury. He failed to obtain either damages or an injunction to restrain the publication.

It is to be observed that the plaintiff had no connexion with the defendant association; he had neither given nor broken any undertaking to them. He sought to trade, as all men are entitled to trade, upon the best terms he could obtain. He was one against many; and, rightly or wrongly, the effect of this decision is that a combination with which he has nothing to do can say to the trader, ‘You will trade upon our terms, or not at all’. No doubt, in this case, the public was the gainer, since the defendants aimed at keeping the price down; but there is nothing to show that the decision would have been different if they had aimed at forcing the price up.

In a case in 1893, *Chambre Syndicale des Ouvriers Fon-*

deurs en Cuivre v. Bonnissent,¹ a trade union of copper-founders had a quarrel with a certain firm engaged in the trade, the Maison Geoffroy. The cause of the quarrel is undefined, but apparently the union considered it serious enough to place the firm upon a black list and to forbid all members of the union to work for Geoffroy. Bonnissent obtained employment with the firm, and his name was immediately published on a 'stop list' in the copper-founders' trade journal. As a result, when Bonnissent left Geoffroy, no other house in the district would give him employment. He succeeded in an action for damages against the trade union, though there is nothing to show that the union had used any illegal or violent means to attain its object.

Though an employer of labour in France, as in England, has full liberty in law to engage, or not to engage, what labour he pleases, it has repeatedly been held by the French Courts that an employer who refuses to engage workmen for no other reason than that they belong to a trade union is liable to an action at the suit of the trade union. There is no conceivable ground on which such an action could lie in an English Court.²

The facts in *Mayor of Bradford v. Pickles*, [1895] A.C. 587 are too well known to need narration. But it is worthy of note that in some of the earlier cases cited in argument³ there were undoubtedly the beginnings of a doctrine, founded on the Civil Law, that a man shall not make an unconscionable use of a legal right to property to the detriment of his neighbour. This incipient doctrine, as formulated by Lord Wensleydale in *Chasemore v. Richards* (1859), 7 H.L.C. 349, at p. 387, was expressly

¹ Dalloz, 1896.2.184.

² The curious case of *Reynolds v. Shipping Federation*, [1924] 1 Ch. 28 is not quite analogous. But it is interesting to observe that Sargant J. suggested *obiter* (at p. 40) that an agreement by a body of employers not to employ an individual or a class of individuals, 'if made maliciously or capriciously, might well amount to a boycott within the reasoning of Lord Lindley in *Quinn v. Leatham*'.

³ See cases cited at p. 590.

rejected by the House of Lords in *Pickles' Case*. Lord Halsbury's uncompromising language¹ has become famous: 'If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it.' Lord Macnaghten describes in the frankest terms Mr. Pickles' conduct and character, but finds no 'malice' in it. 'He has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. . . . He prefers his own interest to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill will to the corporation. They are welcome to the water, and to his land too, if they will pay the price for it.' Possibly the inhabitants of Bradford may not have shared this indulgent view.

In *Ajello v. Worsley*, [1898] 1 Ch. 274, the plaintiffs, manufacturers of pianos, supplied to the trade a certain type of instrument at fifteen guineas. This was usually retailed at twenty-four guineas. The defendant published an advertisement, in which he offered instruments of this type retail at fifteen guineas. At the time of the advertisement the plaintiffs had refused to supply him with pianos, and he had none of this make in stock; so that the advertisement was not true in point of fact, though, on the Court's interpretation of the Sale of Goods Act, 1893, s. 5, it was held not to amount to an actionable misrepresentation. The result of the widely-circulated advertisement was that other dealers, who could not afford the catch-penny trick of selling the pianos at cost price, found the plaintiff's goods unmarketable, and ceased to order them. The manufacturers unsuccessfully sought to restrain the defendant from further publishing his misleading advertisement. Stirling J. found for the defendant, but expressed strong disapproval of his conduct and deprived him of his costs. It is clear that the defendant was sailing

¹ At p. 594.

very close to a fraud on the public, and that he was chiefly actuated by a desire to revenge himself on the plaintiffs for their refusal to supply him with goods. Nevertheless, motive was again held immaterial, the defendant being within, though only just within, his legal rights.

Let us compare a simple case reported at Lyons in 1907. At that time the French law was that a son under the age of twenty-five could not marry without the consent of his father.¹ The father had an unquestionable legal right to withhold his consent at his discretion. In this case the junior defendant had seduced the plaintiff under a promise of marriage. A child was born, and the plaintiff was anxious to be married to its father. The elder defendant, grandfather of the bastard, evidently considered the plaintiff no fit match for his son, and insisted on his legal right to refuse his consent to the marriage. Not only was he held disentitled to do so, but was ordered, jointly with his son, to pay the plaintiff 8,000 francs damages.

The Cour de Cassation has not hesitated to apply the doctrine of *chicane* even to acts which have express administrative authority. By a decree of 1810 the decision of disputes between neighbours was vested in Conseils de Préfecture. The Cour de Cassation twice held in 1826 that the abusive exercise of a right *authorized by a Conseil de Préfecture* under this law was actionable in the ordinary Courts. These decisions, though criticized,² have not been interfered with by the Legislature.

In English law we have no analogies to the cases cited above. But occasionally in the doctrine of equitable fraud we find a suggestion of *chicane*, as distinguished from downright fraudulent dealing. Sometimes, for example, Chancery refuses to allow a litigant, who has a strictly legal right created by an innocent mistake of another party, to insist on it at the expense of the party who has made the mistake. This is the well-known principle of *Webster v.*

¹ The law was changed in the same year: see Sir Malcolm McIlwraith, 'Divorce Law Reform', *L.Q.R.* xxxvii. 483.

² Planiol, *loc. cit.*

Cecil (1861), 30 Beav. 62, and the attempt of Farwell J. in *May v. Platt*, [1900] 1 Ch. 616 to limit the rule to cases in which the defendant has been guilty of misrepresentation amounting to fraud seems now to be discredited.¹ But, for the most part, equitable fraud, however widely interpreted, differs in conception from the Continental doctrine of *chicane*. The former is usually concerned with conduct wrongful in itself, less often with the abusive exercise of right. The whole doctrine of equitable fraud is bound up with those fiduciary or quasi-fiduciary relationships in which one party is bound in equity to show special diligence towards the other. It need not be emphasized that in the case of trustees this duty is placed high.

Where the trustee is an officer of the Court, equity goes beyond diligence and *uberrima fides*, and requires a standard of 'honourable conduct' which comes somewhere near the theory of *chicane*. The doctrine of *Ex parte James* (1874), L.R. 9 Ch. 609, that 'the Court of Bankruptcy ought to be as honest as other people', and that a trustee in bankruptcy ought not to be guilty of a 'dirty trick', even if he can take refuge behind a legal right, has been followed in a number of cases,² nearly all of which have the common feature that money has been paid under a mistake of law (generally ignorance that an act of bankruptcy has been committed), and has found its way into the hands of the trustee in bankruptcy. Money paid under a mistake of law cannot be recovered; yet the Court has repeatedly ordered the trustee to repay money which has come to him in such circumstances, simply on the ground that no honourable man would take advantage of the rule of law. An officer of the Court shall not adopt a lower standard of morality than the average. More than once

¹ Anson on *Contracts* (15th ed.), 177, confirmed by *Graddock v. Hunt*, [1923] 2 Ch. 136.

² *Ex parte Simmonds* (1885), 16 Q.B.D. 308; *In re Tyler*, [1907] 1 K.B. 865; *In re Stokes*, [1919] 2 K.B. 256; *In re Wigzell*, [1921] 2 K.B. 835; see also *In re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67.

the principle was stated so widely that lawyers began to distrust its vagueness. See e.g. per Buckley L.J. in *In re Tyler*, [1907] 1 K.B. at p. 873, where the standard is described as 'natural justice and that which an honest man would do'; and compare Duke L.J. in *In re Thellusson*, [1919] 2 K.B. at p. 754: 'The Court must consider not merely whether he has a cause of action or right or a defence or answer which would prevail at law or in equity as between ordinary litigants, but also what in point of honesty the trustee ought to do in respect of the facts of the case.' In this last-mentioned case the doctrine threatened to become insubstantial. In *Scranton's Trustee v. Pearse*, [1922] 2 Ch. 87, the Court of Appeal found it necessary to deliver a counterblast. This case arose out of the chaos produced by the interpretation put upon section 2 of the Gaming Act, 1835, in *Dey v. Mayo*, [1920] 2 K.B. 346, and *Suiters v. Briggs*, [1922] 1 A.C. 1. The effect of those decisions, and of the subsequent legislation (Gaming Act, 1922), is too well known to need explanation. The question here was whether a trustee in bankruptcy was justified in recovering—which was equivalent to deciding whether he was *bound* to recover—from a winner of a bet the amount of a cheque paid by the bankrupt in settlement of a gaming debt. There was no doubt as to the legal right; but to press it would, in the view of Astbury J., be a 'dirty trick' within the meaning of *Ex parte James*. This view the Court of Appeal emphatically rejected, distinguishing between money paid under a mistake of law, as in most of the preceding cases, and money due as upon a statutory debt, such as was created by section 2 of the Gaming Act, 1835.

In the earlier cases the right upon which the trustee was strictly entitled to rely was a common-law right. In *Scranton's Trustee v. Pearse* it was a right created by statute. Beyond laying down that statute is a more definite authority than common law, or, to put it another way, that it is 'honourable' to press a statutory right to the utmost, but not a common-law right, the case does not seem to

establish any very plain distinction of principle. But no careful reader will fail to detect that the doctrine of *Ex parte James* was thought to have been drifting towards a sphere of which the Court was highly suspicious—the sphere of abstract morality. The Court was presided over by Lord Sterndale M.R., who had already, in *In re Wigzell*, [1921] 2 K.B. at p. 852, expressed a not uncommon common-law attitude towards ethical generalizations. ‘When once you enter on the field in which there is no standard to be applied except that which each person thinks is the one of honesty and right the difficulty of course becomes enormously increased. To repeat Salter J.’s words: “Questions of ethical propriety have always been, and will always be, the subject of honest differences among honest men.”’ And the whole of the judgement is in the same strain.

It is not necessary, and it would certainly be regrettable, to infer from these observations of a distinguished Judge that law and morality are irreconcilably divorced. But the cautious minds of lawyers, and especially common lawyers, immediately feel uneasy when the tangible objective gives place to the intangible subjective; and this, no doubt, is a salutary safeguard against those vagaries which might turn the common law into ‘a roguish thing’.

Nevertheless, even common-law Judges cannot always exclude pure ethics from consideration. Morality, in its sexual aspect, is a commonplace of public policy, and here our law stands on the side of decent living and continence as against looseness and promiscuity. And it would seem that in criminal law, where other circumstances are equal, the immorality of an act may turn the scale against a delinquent, in so far that, if the act is plainly immoral, it throws on the accused the burden of rebutting the presumption that he intended the harm resulting from a *malum in se*. This, at least, is to be gathered from Bramwell B.’s view in *Reg. v. Prince* (1875), L.R. 2 C.C.R. 154, though doubtless that case may be explained on other grounds as well:

'Section 50¹ makes it a felony to unlawfully and carnally know a girl under the age of ten. Section 51 enacts when she is above ten and under twelve to unlawfully and carnally know her is a misdemeanour. Can it be supposed that in the former case a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanour; or that he believed her over twelve, and so had committed no offence at all; or that in a case under section 51 he could claim to be acquitted, because he believed her over twelve. In both cases the act is intrinsically wrong; for the statute says if "unlawfully" done. The act done with a *mens rea* is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. . . . The same principle applies in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer.² Why? Because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered, or in housebreaking, that he did not know the place broken into was a house? Take, also, the case of libel, published when the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong; he could not be entitled to be acquitted because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause.'

If, as Bramwell B. holds, publishing a libel is a *malum in se*, so in the law governing this subject the Courts take cognizance of 'moral and social duties' which are in no way created by positive law, but exist by virtue of public opinion and form the occasion of a qualified privilege. The extremely general terms in which these duties are referred to would give rise to as much scepticism as Lord Sterndale felt about 'questions of ethical propriety' in *In re Wigzell*, were it not that Judges have deliberately chosen to leave these duties at large in the sphere of social morals rather than shackle them with strict formulae. Thus the duty is described as 'recognized by English people of ordinary intelligence and moral principle, but at the same

¹ Of 24 & 25 Vict. c. 100.

² 10 Cox Cr. C. 362.

time not a duty enforceable by legal proceedings, whether civil or criminal'.¹ It 'attaches on every one to do what is for the good of society',² and it exists for 'the common convenience and welfare of society'.³

Equally at large in the moral sphere is the 'express malice' sufficient to destroy the privilege set up by social and moral duties. Here judicial descriptions are even more vague. Malice in this sense is clearly not an *illegal* intent, either criminally or civilly, but 'a *wrong* feeling in a man's mind';⁴ 'any corrupt motive, any wrong motive, or any departure from duty';⁵ 'making use of the occasion for some indirect purpose'.⁶

II

It is not often that our law of torts deals avowedly, as in the cases just cited, with the purely moral aspects of 'wrongfulness'. In modern law principles of liability are concerned more with compensation for damage done than with ethical tests of conduct. There are numerous ways in which one man may become liable to another without any degree of moral guilt. For this reason it has become the fashion to divorce the law of torts entirely from any general principles of moral culpability. Not infrequently we are warned against the attempt to 'rationalize' the law of torts. Actions in tort, we are told, are simply the products of certain forms of procedure. There is no such thing, if one may coin the expression, as a 'tort in gross'. Liability simply means that the Courts, in certain circumstances, acting on certain precedents, will grant certain remedies. The law of civil wrongs, viewed in this light, is not susceptible of jurisprudential analysis; it is merely a catalogue.

¹ *Per* Lindley L.J., *Stuart v. Bell*, [1891] 2 Q.B. 341, 350.

² *Per* Cotton L.J., *Waller v. Loch* (1881), 7 Q.B.D. 619, 622.

³ *Per* Parke B., *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181.

⁴ *Per* Brett L.J., *Clark v. Molyneux* (1877), 3 Q.B.D. 237, 247.

⁵ *Per* Erle C.J., *Turnbull v. Bird* (1861), 2 F. & F. 508, 524.

⁶ *Per* Lord Herschell, *Browne v. Dunn* (1893), 6 Rep. 67, 72.

On the face of it, this is a somewhat startling view. An intelligent person beginning the study of English torts would find it difficult to believe that our law is as inorganic and irrational as is here represented. The mere use of the word 'wrongs' seems to suggest that *some* general principles of liability are to be extracted from a system built up with such care over so long a period of time.

But, we are told, history warns against, history forbids, philosophical generalizations in regard to substantive rules of law. Be content with effects, and inquire not into causes! The history of our law is the history of certain forms of action.

It was Maitland who first impressed this principle on the minds of English lawyers;¹ and it need hardly be said that here, as in all else, he enormously consolidated the scientific study of our law. But Maitland, like all great teachers, often dealt in parable and paradox. 'In the reign of Henry III Bracton had said *Tot erunt formulae brevium quot sunt genera actionum*. . . . Just in Bracton's day it may have been possible to argue in this way. . . . A little later . . . the argument from Right to Remedy is reversed and Bracton's saying is truer if we make it run *Tot erunt actiones quot sunt formulae brevium*—the forms of action are given, the causes of action must be deduced therefrom.' This is a forcible epigrammatic way of calling attention to the predominance of procedure in our medieval law, and the same might be said of almost any system of law in its evolutionary stages.² Frequently Maitland's principle is reproduced in some such form as this: 'In medieval law (or, it may be, in early Roman law) the governing principle is not *Ubi ius ibi remedium* but *Ubi remedium ibi ius*.' This, too, is an epigrammatic way of emphasizing the requirements of adjective law; but taken literally—as, of course, Maitland would never intend it to be taken literally—as a principle of substantive law, it is dangerously fallacious. It is self-evident that the remedy can never be antecedent

¹ *Lectures on the Forms of Action*, Lect. 1.

² See Vinogradoff, *Historical Jurisprudence*, i. 364 ff.

to the right. The conception contradicts itself. Law-givers do not invent remedies for the sake of complicating social relationships; they invent remedies because they observe that certain existing relationships, which previously have been protected inadequately or turbulently or not at all, must be protected for the future in an adequate and orderly manner. Roman or Anglo-Saxon laws did not prescribe penalties for bodily injury in order to create a new social right, the right to personal security; they did so because the right was manifestly considered by all free men to exist, to be in fact protected by the strong hand, and at a certain juncture to call for protection by the still stronger hand of authority. Whatever common lawyers may have thought of the Chancery Clerks after the Statute of Westminster II, those officials did not while away their time in competitions of writ-framing ingenuity. They tried, however imperfectly, to construct the form of remedy which the *right* of the particular case seemed to demand.

The right once legally recognized, the remedy once formulated, of course it must be adhered to meticulously. No medieval lawyer, however much he may have believed in a transcendent Law of Nature, would have been unscientific enough to sum up the law of agreements in a *pacta sunt servanda*, or the legal duty of citizens to each other in a *suum cuique tribuere*. The rules of law are built up line upon line, precept upon precept. Assuredly they are shaped into forms, but not fortuitous or arbitrary forms; they go to make up a thing which is organic, and as to the great bulk, though, of course, not all of it, rational and necessary. In short, like all legal rules, they go to make up a system of *rights*.

Few rights grow up in an ordered society by mere chance. Some, no doubt, are formed by more or less arbitrary custom; but for the most part they come into being, with their concomitant duties, because social life and social conscience demand them. Societies and individuals perpetually struggle for right and justice, oftentimes at an apparently disproportionate sacrifice, when it

would be easier and more comfortable to submit to wrong and injustice.¹ Though law always tends to harden into forms, which only too often become barren and meaningless, yet every piece of formalism is but an attempt to delimit each man's sphere of interests. If sometimes the boundaries are marked out with red tape, if sometimes the language of art degenerates into jargon, yet the aim is not destroyed by the abuse of method.

To ignore evolutionary forms and rely on *a priori* generalities is a method but too familiar in previous ages, and it is no longer possible with the expansion of our historical knowledge. But in our search for the forms—in that scientific investigation which has revolutionized within living memory the study of our law—let us not forget that the kernel exists as well as the shell. Let us not regard a book like the *De Natura Brevium* as a mere recipe book. A glance at Fitzherbert's own preface will show that his aim was not merely to describe the forms of the law, but to use them as a means to discovering legal principles. Such, too, was the aim of Littleton, writing upon the most highly technical branch of English law, governed more than any other by forms and ceremonies. Of his great treatise Professor Holdsworth justly observes:²

'It showed that the common law was not merely a collection of rules of pleading and practice which could be compendiously strung together in the short tracts which for the last century and a half had been the only law books which the legal profession had produced. It showed that it possessed principles and doctrines of its own which were scientifically exact and yet eminently practical, because they were founded upon the actual problems of daily life. The book was founded upon the Year Books, but it was no mere summary of decisions. The author tries to get beyond the decisions to the "arguments and reasons of the law", and thus to construct from the already vast number of decisions upon the various parts of his subject a coherent body of legal doctrine by which "a man more sooner shall come to the certainty and knowledge of the law. *Lex plus laudatur quando ratione probatur*".'

¹ Ihering, *Kampf um's Recht*.

² *H.E.L.* ii. 484.

But even if legal rules be merely recipes, recipes exist in order that men may eat; and as Monsieur Jourdain discovered, men eat in order to live, and do not live in order to eat. *Rights* spring from *right*. Principles of liability, in the last analysis, must be derived from the moral sense of the community, and to this extent the whole of our law of crimes and torts is intimately connected with morality. That inevitably is the foundation. But as rules grow and take shape, owing to practical necessities in their interpretation and application, artificial accretions are certain to obscure their moral basis. It would be absurd to consider the present English law of torts as a set of moral rules. But it is equally unscientific and unhistorical to consider it merely as a compost of technical formulae without any underlying principles of duty, morality, policy, or convenience.

'The law of torts', writes Mr. Justice Holmes,¹ 'may be summed up very simply. At the two extremes of the law are rules determined by policy without reference to any kind of morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community. But in the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests, of morals. But as the law has grown, even when its standards have continued to model themselves on those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.'

It is one thing to state that our law of torts is founded on certain principles of duty, morality, policy, or convenience; it is quite another to disengage those principles from the vast mass of our common law. That is a task beyond the writer's present purpose, even if he were competent to undertake it. Yet he believes that at bottom the rules of

¹ *The Common Law*, Lect. IV, *ad fin.*

civil liability come back to one simple guiding principle, which one of our most distinguished common lawyers does not hesitate to state in these plain terms:¹ 'All damage wilfully done to one's neighbour is actionable unless it can be justified or excused.' Other systems of law make this principle the starting-point of their whole scheme of civil liability; for example, no Article of the *Code Civil* is better known than Article 1382:

'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.'

Article 1383: 'Chacun est responsable du dommage qu'il a causé, non-seulement par son fait, mais encore par sa négligence ou par son imprudence.'

To the same effect is the Swiss *Code des Obligations*, Article 41:

'Celui qui cause, d'une manière illicite, un dommage à autrui soit intentionnellement, soit par négligence ou imprudence, est tenu de le réparer. Celui qui cause intentionnellement un dommage à autrui par des faits contraires aux mœurs est également tenu de le réparer.'

And, again, the Italian Civil Code, Article 1151:

'Qualunque fatto dell' uomo che arreca danno ad altri, oblige quello per colpa del quale è avvenuto, a risarcire il danno.'

Article 1152: 'Ognuno è responsabile del danno che ha cagionato non solamente per un fatto proprio, ma anchè per propria negligenza od imprudenza.'

But this, it may be said, is not morality. It has nothing to do with conscience; it merely aims at compensation. But is it not morality? At all events, it is not a bad working code of righteousness for the average citizen. It comes as close as is reasonably possible to the *suum cuique tribuere*, and it carries with it by necessary implication the *honeste vivere*. For obviously, if you live righteously, you will run the least risk of injuring your neighbour, and of having to make reparation. But if you do cause damage, either

¹ Pollock, *Torts* (10th ed.), 341.

deliberately or inadvertently, then reasonable reparation is the clearest dictate of justice in the moral as well as the legal sense.¹ Obviously there must be limits to this kind of liability. No man can exist in the ordinary hurly-burly without sometimes doing somebody harm. He who wishes to live entirely unspotted from the world must migrate to another planet. The law therefore has to make many exceptions to the basic principle, and hence result all the ramifications of *damnum sine iniuria*. Nevertheless, the basic principle remains, or the whole edifice falls to the ground. However tenaciously one may cling to the 'catalogue' view of torts, sooner or later one will be forced to ask: What is the fundamental rule of liability to be applied to this case? For, however numerous the existing permutations and combinations of torts, however clear-cut the classifications of text-books, the list of 'actions upon the case in the nature of trespass' is by no means closed, and probably never will be closed. Modern Judges are still found saying what Lord Camden said in 1762 in answer to the objection that the action was of a novel description: 'So it was said in *Ashby v. White*. I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief.'² And when the guiding

¹ Sir John Salmond denies that compensation can be a rational end of justice ('The Principles of Liability', *Essays in Jurisprudence*). 'Given a wrong contemplated, it is reasonable to prevent it by physical force; given a wrong committed, it is reasonable to punish the wrong-doer in order that further wrongs of the same nature may be prevented; but given a wrong committed, is it reasonable to compel the wrong-doer to compensate the person wronged? . . . Paradoxical though the statement may appear, it seems strictly true that compensation is not a rational end of the administration of justice. Apart from punishment, there is no more reason why I should have to compensate A for injury inflicted on him by me, than why I should have to compensate him for injury inflicted by anyone else, or by the mere forces of nature. Damage should lie where it falls unless there is some good reason for shifting it elsewhere.' The present writer confesses himself unable to follow this reasoning.

² See Darling J. in *Manton v. Brocklebank*, [1923] 1 K.B. 406, 413, citing *Chapman v. Pickersgill* (1762), 2 Wils. 145. The actual decision in

principle is sought, it seems to lie between two alternatives—either (1) you may do what harm you please, provided you keep on the right side of the law; or (2) you shall not do damage, unless there is a reasonable excuse for it. Can it be doubted which of these two principles is inherent in the law of torts? Or can it be doubted that one is immoral and the other moral? If we had to reduce the chief principle of liability to a single formula, as in the *Code Civil*, which of the two alternatives should we adopt? We do not work by codes in this country; but there is a genius in the common law which proceeds inductively, if cautiously, to rational principles, and to these we need not be blinded by the anxiety for historical accuracy.

The truth is that we are getting further and further away from the doctrine, once accepted almost as an axiom, that the spheres of law and morals are utterly distinct. This was the view popular in eighteenth and early nineteenth century philosophy, when the prevailing doctrine, directly produced by current facts and theories of sovereignty, was that law represented obligatory constraint upon the individual, while morality was solely matter of the individual's own conscience; the one essentially objective, the other essentially subjective. Kant drew a sharp dividing-line between the rules of law which affect the externals of man's conduct and the internal moral sense. Law thus aims at the delimitation of material rights and duties, morality at the ethical evaluation of those rights and duties. Law must concern itself with intentions, morality with motives.¹

In an age when a theory of arbitrary sovereignty still flourished, it was as natural as it was necessary that men should react in favour of individual conscience. Kant accepted the notion of the social contract, and was greatly influenced by Rousseau,² though he accepted it rather as an abstraction than as an historical fact. Yet, even on

Manion v. Brocklebank was reversed, [1923] 2 K.B. 21, but the dictum contains a familiar principle.

¹ Korkunov, *Theory of Law*, 55 ff.

² Vinogradoff, *Historical Jurisprudence*, i. 112.

Kant's own reasoning—and assuming that the current conception of sovereignty, with the provocation it gave to excessive individualism, must have coloured his views—critics have not deemed him consistent in his rigid distinction between law and morals,¹ for according to his own formulation of the moral law it is inherent in his categorical imperative that the moral criterion should be the *universality* of the law to which the particular act should conform. This necessarily involves a harmony, or the constant attempt at harmony, between the individual and his fellow-members of society, from whom he can never be separated by practical reason.

'Act in such a way', runs Kant's maxim, 'that, in willing to act, you can will that the maxim of your act should become a universal law.'

'Man has to conform his particular to his universal nature; and this involves the double task of establishing within himself a harmony of the particular desires to reason and of conforming his relations as one individual with other individuals, to the same reason regarded as a principle of social unity. Or, more simply, he has to bring himself as an animal into harmony with himself as a rational being, and in doing so he has to work out, so far as lies in him, the harmony of all beings and things with each other under the principle of reason.'²

Thus the *inner* sense, by which he works out his own morality of motive, operates in necessary conjunction with his *outer* sense, by which he adjusts himself to the external facts of social existence. The former sense is the sphere of morals, the latter of law.

But even Kant's own school felt the co-operation of the two senses to be so intimate that it became increasingly difficult for them to keep the two spheres apart. In 1796,³ for example, Fichte insisted even more stringently than Kant on the separation; in 1812⁴ he changed his view, and recognized the necessity for a closer approximation of law

¹ Caird, *Critical Philosophy of Kant*, ii. bk. ii. ch. vi.

² *Ibid.* ii. 318.

³ *Grundlage des Naturrechts*.

⁴ *System der Rechtslehre*.

and morals. Men's view of the nature of law was changing, and continued to change throughout the nineteenth century. When a great deal of political theory regarded law as the mere creature of a supreme Sovereign possessed of rights without duties (even though the Sovereign was the product of a supposed collective will), it was, indeed, possible and probable that there should often be a dissidence between the 'outer' sense of social requirements and the 'inner' sense of right. But the same conflict will not be so likely if we consider law to be developing as a thing not arbitrary but organic, itself a product of that principle of *universality* which is Kant's moral law. If we believe that the growth of legal systems is itself governed by some great principle of social teleology, we come very near to Kant's own 'kingdom of ends'—'a social community of beings, each of which is reciprocally end and means to the others'.¹ To this teleological view of law jurisprudence, faced with the legal and social transformations of the nineteenth century, was rapidly gravitating, when it received its formulation from von Ihering. He is but one, though the most eminent, representative of a tendency which has fundamentally changed men's notions of sovereignty. Nowadays conflicting theories abound; we are still in the transitional stage; but the one thing certain is that the Leviathan is as dead as the Dodo. We are forced by innumerable evidences to a view of law, not as the bare command of an irresponsible Sovereign, but as a code of conduct prescribed by, and consonant with the social necessities of, the mass of citizens. We need not go as far as Professor Duguit in regarding the State Sovereign as merely a plexus of public utilities, nor need we consider modern society as hopelessly abandoned to State Socialism. The law of the twentieth century becomes more and more a reasoned thing, a system invented neither by the will of a tyrant nor by the refinements of logicians, but by the conscious needs of societies struggling towards democratic forms of government. The individual sense of right, therefore, need no

¹ Caird, *op. cit.* ii. 223.

longer find itself in antagonism to social rules, for the effort—no doubt as yet but imperfectly realized—is that those rules themselves shall spring from the collective conscience. We have said above that *suum cuique tribuere* is no bad working code of morals for the ordinary man. But we do not mean that it is merely a code of convenience. It is impossible in modern society to behave with due regard to the rights of others without having some moral consciousness of those rights. For the most part they are themselves moral.¹ It is impossible to delimit interests without having some regard to the moral quality of the interests concerned.

Thus we move rapidly towards a testing of legal rules and rights by their social value, and not merely by their coercive validity. To-day a learned jurist can describe the constructive processes of modern law in terms as broad as these:²

'The jurisprudence of to-day catalogues or inventories individual claims, individual wants, individual desires, as did the jurisprudence of the nineteenth century. Only it does not stop there and say that these claims inevitably call for legal recognition and legal securing in and of themselves. It goes on to ask: What claims, what demands are involved in the existence of the society in which these individual demands are put forward; how far may these individual demands be put in terms of those social interests or identified with them, and when so subsumed under social interests, in so far as they may be so treated, what will give the fullest effect to those social interests with the least sacrifice? We owe this way of thinking to Rudolf von Ihering, who was the first to insist upon the interests which the legal order secures, rather than the legal right by which it secures them.'

And we may add that von Ihering considered not merely the interests themselves, but the ultimate social ends which

¹ The view here suggested of compensation, justice, and morality was written before reading Professor Gényn's *Science et technique en droit privé positif*. I am fortified in my view by that learned writer's masterly exposition of the point of contact between law and morals: *op. cit.* § 20; cf. Korkunov, *Theory of Law*, § 7.

² Pound, *The Spirit of the Common Law*, 203.

they subserve. These conclusions of Professor Pound's are not offered by him as mere counsels of perfection; they are supported by abundant evidence from many branches of law. It is significant to find him consigning the theory of unlimited legal right—the doctrine of *Mayor of Bradford v. Pickles*—to an inevitable doom.

'In a world of discovery and colonizing activity, in a society of pioneers engaged in discovering, appropriating and exploiting the resources of nature, this interest (i.e. the conservation of social resources) seemed negligible. In the crowded world of to-day the law is constantly taking account of it and the *ius abutendi* as an incident of ownership is becoming obsolete.'¹

It will die hard in England; but the sooner we are able to pronounce life extinct, and follow it decently to the grave, the better, I believe, for English jurisprudence.

¹ *Op. cit.* 209. But the principle is by no means new. The limitations on property which existed in Roman law were greater than is sometimes realized: see Girard, *Manuel de Droit romain*, bk. iii, s. ii, ch. 1.

THE YOUNG BENTHAM¹

NOT the least remarkable feature of Bentham's genius is its sheer amount. His collected works, in Bowring's edition, number eleven large, closely-printed (and, it must be added, unattractively-printed) volumes, each containing about half a million words. In addition, he supplied a considerable amount of material to be worked upon by others, including John Stuart Mill and the adoring Dumont; and not all that was taken from him was given.² For about eighteen years he had already been working, amassing and writing indefatigably, when, in 1792, an inherited fortune placed him above material cares; he was then forty-four, and during the forty years which remained to him—indeed, until the very day of his death—his life may be said to have consisted of pen, ink, and paper. Actual publication seems to have been a matter of secondary importance to him; his chief concern was to leave a complete record of all the versatile activities of his mind. The result is not to be calculated by printed volumes alone, but by *avoirdupois*. The library of University College, London, contains much raw Bentham in bulk—to be precise, '172 portfolios and wooden boxes, each containing about 300 loose sheets'. It was possibly because the learned world felt that it had enough Bentham 'to go on with' that it for so long remained incurious about this accumulation. But the omission was regrettable, and the Social Science Research Council of America wisely repaired it when it granted Mr. Charles Warren Everett a Research Fellowship to investigate the manuscripts. The enterprise has been amply justified, and all students of law and jurisprudence have been placed under a heavy debt, by the dis-

¹ *Law Quarterly Review*, xliv. 492.

² Bowring, his editor, once remarked to Talleyrand that of all modern writers Bentham was the one from whom most had been stolen without acknowledgement. 'True', replied Talleyrand, '*et pillé de tout le monde il est toujours riche*.'

covery and publication of the little book which now appears as *A Comment on the Commentaries* (The Clarendon Press: 155.). Not only is it exceedingly characteristic, entertaining, and suggestive in itself, but it occupies an important place in the development of Bentham's thought and in the shaping of his career. It is also indispensable as prolegomena to one of Bentham's most influential works, the *Fragment on Government*. It is perhaps too much to hope that any considerable popular interest can now be revived in Bentham's writings, for it is the ironic fate of the successful reformer that when his reforms have been realized, he ceases to be interesting. But it seems probable that this essay, had it been known earlier, would have had the same 'prospect of life' as the *Principles of Morals and Legislation* and the *Fragment on Government*—and for the same reasons, viz. the concentrated Benthamism of its outlook, and in particular the animation of its style. It will certainly form a capital document for all future students of Bentham's place in the history of our legal and social institutions.

The provenance of the essay is characteristic of Bentham's ideas. In 1763 he attended Blackstone's lectures at Oxford. It was an historic occasion in the teaching of law in England: but to the singularly independent mind of this young critic it was only another altar, as melancholy as it was ornate, to the false gods of a creed outworn. Let us hear his own account of it, contained in the Historical Preface (first printed in 1828) to the second edition of the *Fragment on Government*—one of the most vivacious things Bentham ever wrote:

'Blackstone seemed to have had something about him, that rendered breaches with him not difficult.' [Here let us interject that 'Blackstone seems to have had something about him' which excited a personal antipathy in Bentham. Large-minded though he was, he was not incapable of such prejudices.] 'It was while I was a child without a guide—idling, trembling and hiding myself at Queen's College, Oxford—that the Commentator, then Fellow of All Souls, took possession of the new created [Vinerian] Law

Professorship. Browne, Provost of Queen's, was then Vice-Chancellor. Professor served Vice-Chancellor with notice, accompanying it with a claim of precedence. The Vice-Chancellor, when in the streets, was, and I suppose is, preceded by a stick with silver on it, called a *mace*, and a man called a *beadle* to carry it. "Let him walk," said Browne, "before my Beadle".

'Lord Shelburne had been the making of Blackstone.¹ The Lord had been in personal favour with George III. He introduced the Lecturer, and made the Monarch sit to be lectured: so he himself told me. The lecturer, as any body may see, showed the King how Majesty is God upon earth: Majesty could do no less than make him a Judge for it. Blasphemy is—saying any thing a Judge may gratify himself, or think he can recommend himself, by punishing a man for. If tailoring a man out with God's *attributes*, and under that very name, is blasphemy, none was ever so rank as Blackstone's. The Commentaries remained unprosecuted; the poison still injected into all eyes: piety never offended by it: it *may be* perhaps, should piety in high places ever cease to be a tool of despotism.

'I, too, heard the lectures; age, sixteen; and even then, no small part of them with rebel ears. The *attributes*, I remember, in particular, stuck in my stomach. No such audacity, however, as that of publishing my rebellion, was at that time in my thoughts.'

The 'audacity', indeed, was ten years in the wood, and even then was brought to maturity by accident rather than by design. One of Bentham's most intimate friends in youth was John Lind, a barrister who had interested himself in Polish politics, had been in the counsel and employment of the Royal House of Poland, and for some time was Resident of Poland at the Court of St. James's. He had won some literary celebrity by a vigorous attack (*Letters on Polish Affairs*) on the First Partition of Poland.² Lind

¹ He had been, in no small measure, the making of Bentham himself, having 'taken him up' when he was an unknown young man and having introduced him to influential society at Bowood. Despite a very provocative attempt by Bentham in 1790 to force a quarrel, they remained fast friends.

² The relations between Bentham and Lind seem to have fluctuated not a little. After a very close intimacy, during which Bentham was almost a member of Lind's household, they quarrelled in 1775, but were reconciled in the same year, but not warmly, it would seem. In 1776 Lind championed

—possibly influenced by views which Bentham had expressed to him—began to compose an attack on Blackstone, and submitted it to Bentham's criticism. It was far too mild for Bentham's taste. In a very incisive letter of October 5, 1774, quoted in Mr. Everett's Introduction, he states his objections in terms courteous but so candid as to remind one of the 'advice to a young artist' attributed to Whistler: 'Rub it out and start again.' It was characteristic of Bentham that he was not content with telling his friend that the thing should be better done; he would take his pen in hand and *show* him how it ought to be done. He set to work without delay.

'Take what I have done, if you happen to approve of it more than your own, consider the whole as your own, most heartily will you be welcome: or else 2nd, Let me go on with it under your inspection and with your corrections, and let profit or loss be equally divided between us, or 3rdly, if you approve of neither of these, I believe I shall be tempted to go on with it on my own account, keeping it back half a year if you think that enough, that it may not hurt yours, its parent, to which it will have been so much indebted.'

Lind seems to have thought that the parent might well yield precedence to so forward a child; at all events, he withdrew from the project, and Bentham went on working at it.

And this, as it chanced, was to be the turning-point of his career. He was now twenty-seven: he had been five years at the Bar, with negative results. The ten years which had elapsed since his undistinguished and uncongenial academic career had borne no fruit which could possibly be pleasing in the eyes of a conventionally-minded parent like Jeremiah Bentham. He had openly avowed to his father that the treatise on *Critical Jurisprudence* (afterwards to be the important *Principles of Morals and Legislation*) was of far more interest to him than clients

the anonymous *Fragment on Government* in the *Morning Chronicle* (Bentham's *Works*, i. 258). Many years later, in the Historical Introduction to the *Fragment on Government*, Bentham refers to Lind in slighting and satirical terms, and indeed twice becomes almost defamatory.

and briefs, and that all else, for the time at least, must be subordinate to it. He had an inadequate competence. His future was highly uncertain.

And here enters romance. Jeremy Bentham was even as other men. In this poverty of prospects he must needs fall in love with a Miss Dunkly, described by Mr. Everett (on what evidence is not made clear) as 'a pretty girl with no fortune, a friend of Mr. and Mrs. Lind's, at whose house Bentham probably met her'. Inevitably the match was frowned upon by Jeremiah Bentham. 'He gave Jeremy plainly to understand that a marriage so foolish, so "criminal", would be without parental blessing or bounty.' The wayward son must therefore provide his own bounty, and, apparently on Lind's suggestion, decided to do so by becoming a professional scribe. He hoped that the *Comment on the Commentaries*, in the form of 'a handsome octavo volume', might fetch £120, and that he might 'have alacrity enough to produce one every year'.

Disillusion, or Miss Dunkly, or both, saved him from this life-sentence of pot-boiling. 'My Polly' evidently could not face a future so precarious and a marriage adjourned *sine die*; only a year later Jeremy 'has not heard from her for a good while'. And then she disappears. It is a little tantalizing that Mr. Everett does not tell us more. Probably there is no more to tell. By all the accepted canons, she should have deserted her briefless barrister for a wealthy nonentity, and lived to weep over her rejected swain's fame and influence. Perhaps, on the other hand, she lived to congratulate herself that she had never entered into competition with Panopticons, Chrestomathias, and Pannomions! We must not speculate. Her first appearance in literary history is also her last. Mr. Everett does not tell us the source of his information about this hitherto unpublished piece of biography, but footnotes seem to indicate that it comes from newly-explored Add. MSS. in the British Museum.¹

¹ Was it to this lady, or to some other, that Bentham addressed in old age the striking letter preserved by Bowring? 'I am alive, more than two

Thus between Lind on the one hand and Miss Dunkly on the other, the occasion of the *Comment on the Commentaries* was somewhat fortuitous: and with the disappearance of Miss Dunkly one *raison d'être* evaporated. It may have been for this reason that after eighteen months' work it was abandoned and is never referred to again by Bentham. Perhaps it was deliberately dismissed on account of painful associations. In later years it may have been regarded as too immature.¹ Possibly it was considered simply as a useful exercise (which it certainly was) and forgotten. There would be nothing unusual in that. Throughout his life it was a peculiarity of Bentham's that his dissertations were often printed long after they had been written, and often published long after they had been printed. And a good many were never printed or published at all.

But there was another reason for putting aside the *Comment on the Commentaries*. Bentham had become engrossed in one small portion of Blackstone's Introduction, which at first he had passed over lightly as not being sufficiently relevant to Blackstone's principal and proper theme—the exposition of substantive rules of law. It was that part (1 Comm. 47 ff.), copied almost verbatim from Burlamaqui's *Droit de la Nature*,² which raises the whole question of sovereignty in civil government. This is Bentham's own account of the circumstances which led him to devote special attention to this excursion into political theory:

months advanced in my eightieth year,—more lively than when you presented me in ceremony with the flower in Green Lane. Since that day not a single one has passed in which you have not engrossed more of my thoughts than I could have wished. . . . I have a ring with some snow-white hair in it and my profile, which everybody says is like; at my death you shall have such another.' (Cited Dillon, 'Influence of Bentham', in *Select Essays in Anglo-American Legal History*, i. 495.)

¹ The tone of the *Fragment on Government* is, on the whole, more restrained.

² As Mr. Everett mentions (p. 9), G. P. Macdonell (*Art. Blackstone in D.N.B.*) was the first to point this out.

"The farther I proceeded in examining it, the more confused and unsatisfactory it appeared to me: and the greater difficulty I found in knowing what to make of it, the more words it cost me, I found, to say so. In this way, and by these means, it was that the present Essay grew to the bulk in which the reader sees it. When it was nearly completed, it occurred to me, that as the digression itself, which I was examining, was perfectly distinct from, and unconnected with the text from which it starts, so was, or so at least might be, the *critique* on that digression, from the *critique* on the text. The former was by much too large to be engrafted into the latter: and since, if it accompanied it at all, it could only be in the shape of an Appendix, there seemed no reason why the same publication should include them both. To the former, therefore, as being the least, I determined to give that finish which I was able, and which I thought was necessary: and to publish it in this detached manner, as the first, if not the only part of a work the principal and remaining part of which may possibly see the light some time or other, under some such title as that of "A Comment on the Commentaries".'

The 'digression' then became Bentham's first printed though, as we have seen, not first written work of importance. It was published anonymously and caused no little stir: its authorship was the subject of many conjectures, which are very humorously described in the introduction to the 1828 edition. It occupies a place of the highest importance not only in Bentham's own work, but in the whole history of English political science. Nobody was better aware of this fact than Bentham himself. Bowring (*Works*, i. 260) records that Bentham's own copy of the work bore the following note: 'This was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-wisdom on the field of law.'

Particular interest then attaches to the main work which might 'possibly see the light some time or other', and which, as it chanced, has not seen the light until nearly a century after its author's death.

Bentham is extremely frank as to his iconoclastic motive. 'The principal and professed purpose of [this Essay] is, to

expose the errors and insufficiencies of our Author. The business of it is rather to *overthrow* than to *set up*; which latter task can seldom be performed to any great advantage where the former is the principal one' (*Works*, i. 239). The main object therefore was—to use the expressive French word—to 'deconsider' Blackstone, to show the clay feet of a writer who was becoming—and who continued to become, despite all Bentham's broadsides—an idol. As has been suggested, there was something of personal antipathy in this attitude, and conceivably just a little jealousy—for it was hard to forgive Blackstone his success. But what Bentham detested and assaulted was not so much Blackstone as what Blackstone stood for: and he stood for a narcotic complacency which not only tolerated but rhapsodized over a legal system once described by Bentham as 'a fathomless and boundless chaos, made up of fiction, tautology, technicality, and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery, which maximises delay and denial of justice'. Bentham's design, accordingly, was that of 'pointing out some of what appeared to me the capital blemishes of that work [the *Commentaries*], particularly the grand and fundamental one, the *antipathy to reformation*'. All this was as consistent as it was candid: in men like Blackstone and Eldon, Bentham saw his natural enemies, and never ceased to wage war on them.

But the purely destructive method carries its own inevitable imperfections in itself—imperfections which very plainly appear in this youthful work. This relentless critic will never allow the object of his fury to be right in any particular, except by accident. Does he meet with a statement which seems unexceptionable, his usual comment is either 'He seems to have hit the ball, *but it was a fluke*', or 'This seems to be true, but it is so obvious that it was hardly worth stating'. In short, the unhappy Blackstone is incapable of any truth except truism! Thus when he says (contrary to a good deal of loose theory, derived from Coke, about the subordination of statutes to 'reason' or

'the law of God'), 'But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it', he is saying what was eminently consistent with Bentham's whole doctrine. This is the grudging acknowledgement (p. 152):

'I am glad to have got this much out of our Author: tho reluctant to separate himself from his brethren, scarce venturing to speak out, and half afraid to listen to the plain suggestions of his own reason: and tho to conciliate indulgence for his own Schizm, he slinks into a compromise which involves all the absurdities of the tenets he disowns.'

Not infrequently, when argument fails, he resorts to irrelevant satire: his gibes are the clearest indications of the immaturity of the work, and may have had some influence in deciding the older Bentham not to publish the Essay. Thus (p. 33): 'There is one thing our great man could do: that is, read. There is another thing he could not do: that is, extract the spirit of what he read. It is with this Commentator as with so many other Commentators: his appetite is better than his digestion.' (One is reminded of a *mot* concerning a celebrated statesman of our own time: 'I think So-and-So *can* read, but I am sure he never *does*.') 'But it is the way with Lawyers, and above all with this Lawyer: they can no more speak at their ease without a fiction in their mouths, than Demosthenes without his pebbles.' In a note to p. 35 we read this cheap nonsense:

'Synonymisms spring up like mushrooms in the fertile-hotbed of our Author's brain. Why did he not write in verse? It can scarcely be only from an undue deference to modern prejudices that our flow'ry Author condescended to tread the career of humble prose. Verse is what his oracles like those of the ancient sages, would have shew'd best in. Materials even less ample than those he has everywhere raked together might be enough for a moderate man to make into a *Gradus ad Parnassum*; a flight of steps to carry him to Parnassus. He might have got better than a puiſne seat upon that mountain.'

And so on, at quite disproportionate length.

But if this exuberance sometimes leads to miscalculated irony and questionable taste, it often expresses itself in genuine wit—a quality which Bentham always possessed in abundance. Not the least interesting feature of this Fragment is the overflowing vitality of its style. It is, quite apart from its polemics, extremely good reading. All writers on Bentham have observed that in his later years a great change came over his style, and a change for the worse. Instead of the vigorous, whimsical English which was natural to him, he fell more and more into the habit of jargon and neologism, developed eccentric theories of syntax, and in the effort after comprehensiveness plunged his reader into a pathless jungle of polysyllables. These idiosyncrasies, which unhappily infected his disciple Austin, make some of his later works very unpalatable as literature. They are for the most part absent from the earlier essays: and it is probably for that reason—no doubt also because they were in the nature of manifestoes—that his two earliest works, the *Principles of Morals and Legislation* and the *Fragment on Government*, have survived the most vigorously, although in both of them Bentham was dealing with abstractions and subtleties which made the largest demands on his resources of expression. The *Comment on the Commentaries* shows in a high degree the same command of phrase and form, the same aptness of illustration, the same combination of homely common sense and agile dialectic, the same directness and clarity of expression. Many of the barbs are finely pointed. Dizzy might have said this (p. 40): 'Our author, who not knowing very well what else to give us seemed resolved at least to give us a decent sermon, has sought everywhere to atone by the exuberance of his piety for the defects of his penetration.' He sums up (not without justification) Blackstone's exposition of the nature of 'municipal law' thus (p. 73): 'Upon the whole what we are taught concerning Municipal LAW (contradictions apart) by this elaborate definition may be summed up as follows: that it is a rule of conduct for those who are to observe it,

prescribed by those who prescribe it, commanding what it commands and forbidding what it forbids.' Is there not a certain truth in this? 'Logic as studied in the Universities, is an instrument which they pretend to teach how to correct, but never think to teach how to use.' And there was certainly truth in this: 'It is but lately, very lately that Lawyers have weaned themselves from the conceit that the way to make their notions respectable is to fashion them as unlike as possible to those of other men.' There are one or two happy little *facetiae*. 'Dr. Brown's . . . story teller' (p. 30) 'had "a windmill that used to lay eggs and hatch young ones". This producing a sort of stare—"Ah," says he, "but you are to know when I say a *windmill*, I mean a *goose*." I fear many of our Author's windmills may prove geese.' And the following deserves a place in the Hundred Best Stories of that much-anecdoted class, the clergy:

'I cannot help calling to mind on this occasion a certain Divine I once heard preach, whose notions tallied exactly with those of our Author. He was making his prayer before Sermon; and willing to pay God Almighty a higher compliment than common, complimented him with the power of "altering events": "O God, who alterest all events"; which one sees there can be but one way of doing which is making them to have happened otherwise than they have.'

As to the main line of argument, there is never any departure from the professed object of 'laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole' (of the *Commentaries*). Bentham does not presume to challenge Blackstone's exegesis of the actual substantive rules of English law, which he regards as 'mere compilation'. (He does, however, pick up 'our Author' tartly on two or three small points of inaccuracy or inconsistency.) He addresses himself to the views advanced concerning the origin, nature, and operation of law generally. With Blackstone's introductory generalities as to the different kinds of law he has a comparatively easy time. It is not difficult to show 'the impropriety of mixing theology either natural or

revealed with jurisprudence, and the natural in particular with either Jurisprudence or Morality': to demonstrate Blackstone's confusion of legal and moral obligation: to pour scorn on the conception of legal obligations *in foro conscientiae*: to poke fun at the notion of legal Right being dictated by the Law of Nature. Easy, too, to show how lightly and unconvincingly Blackstone passed over the problem, acute in the eighteenth century, of the publicity and promulgation of law. On these fundamental matters Bentham's reasoning undoubtedly points to facile acquiescences, to confusions and negligences, in Blackstone's jurisprudence.

On the other hand, a good deal of the criticism of Blackstone's rules for the interpretation of law is captious, and lacks the clarity of the remainder. Yet even here Bentham's irrepressible scepticism is often stimulating. He will take nothing for granted, and is unawed by the most settled maxims of the law. Thus there is much justice in his criticism of the maxims *cessante ratione legis cessat lex ipsa* and 'penal statutes must be strictly construed'. The former, unless qualified by exceptions which virtually destroy it, is dangerous and misleading; as to the latter, it is difficult to resist Bentham's argument that, when closely examined, the following statement of Blackstone (1 Comm. 88) really contains very little meaning:

'But the difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside a fraudulent transaction, here it is to be construed liberally.'

Nor can we withhold our sympathy from the attack upon the absurd rule of the period that when a repealing statute was itself repealed, the statute originally repealed was automatically revived. In challenging this rule, which has long since disappeared, Bentham was amply justified: he seems, however, to have been mistaken in questioning Blackstone's statement of it. There was abundant authority

for it, and from time to time it occasioned deplorable confusion in statute law.

Much of the discussion of customary law is in the nature of somewhat unprofitable wrangling. But here there is a curious example of the rightness of Bentham's instinct, even when he could not support his thesis by chapter and verse. History was always Bentham's weakest point: a juster perception of it, as has been often observed, would have saved him from some of his more chimerical doctrines. But in one important matter he is historically right and Blackstone is historically wrong. To Blackstone the common law is simply 'General Custom'; and his whole conception of 'general custom' is that it is *purely* spontaneous, establishing itself by 'common consent' and popular usage.

'Thus, for example, that there be four superior Courts of Record, the Chancery, the King's Bench, the Common Pleas and the Exchequer; . . . that the eldest son alone is heir to his Ancestor; . . . that property may be acquired and transferred by writing; that a deed is of no validity unless sealed and delivered; . . . that wills shall be construed more favourably, and deeds more strictly; . . . that money lent upon bond is recoverable by action of debt; . . . that breaking the public peace is an offence, and punishable by fine and imprisonment; . . . all these are doctrines that are not set down in any written statute or ordinance, but *depend merely upon immemorial usage, that is, upon Common Law, for their support.*'

The suggestion is, of course, that nothing artificial goes to the creation of any of these important rules. Bentham strenuously insists on the absurdity of considering them 'immemorial'. Without supporting his argument by any historical evidence, he contends that at some definite point of time they must have been established by precedent. He is vague in his assertions, and contents himself with reiterating rather tediously that they cannot have existed among 'our Saxon ancestors'. But his instinct was right. Later research has shown that nearly all Blackstone's examples can be traced to 'the custom of the Court'—that is, to judicial doctrines quite consciously established

or adopted. This is not to say that the spontaneous popular element is entirely lacking; much of the business of the Courts in the twelfth century was to choose between, or to harmonize, existing but conflicting local customs, probably diversely enforced by local Courts. But it is certain that the influence of the Royal Courts was deliberate and powerful, and that Blackstone's 'immemorial' must be taken with large reservations.

As to Blackstone's famous 'judicial tests' of custom, there is no small force in Bentham's contention that a number of his carefully-stated rules (generally considered to be still authoritative) merely affirm the same proposition in different ways. And it is noteworthy that Bentham perceived (p. 220) what, in the submission of the present writer, has been insufficiently recognized by later commentators, but is essentially true—that these 'tests' are really only rules of evidence for determining the existence *in fact* of alleged customs. 'And so unchangeable are these rules relative to legality, that the purport of the greater part of them is to reprobate so many supposed sorts of customs upon the ground of non-existence.'

The chapter on 'Judicial Decisions' shows the young Bentham, at the sight of his bogey, 'judge-made law', trembling with the rage which convulsed him to the end of his days. At Blackstone's statement that precedents are rejected not because they are bad law, but because they are *not law*, he cries (p. 193):

'And it is this miserable sophistry that is to sanctify all that doting pedants have drivelled out upon it in the way of panegyric. "And hence" . . . yes "hence" . . . "it is", continues he, "that our lawyers are with justice so copious in their encomiums of the Common Law; that they tell us that the Law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law." This latter proposition is easily made good when one knows the key of the conundrum. The trick is, when you are satisfied a thing is not Law, say it is not reason.'

All judge-made law is summarily dismissed as 'Law *unauthoritative*': the only authoritative law is 'an assem-

blage of words purporting to express the will of a Legislator'. The principle, stated thus early in Bentham's career, has a prophetic significance. It is the forerunner of that unbounded confidence in the efficacy of legislation which more than anything else gives its distinctive character to Bentham's life work. In much the same way, he here experiments with an occupation which was to form a large part of his subsequent labours. Taking an old statute cited by Blackstone (1 Comm. 88), the 1 Edw. 6, concerning horse stealing, he shows (p. 143) that for 628 words of the enactment forty-six might be substituted not only without loss, but with material gain, of precision. He continues:

'I have thought somewhat on the subject, and scruple not to avow this persuasion: that a decent attention, together with an adherence to the common modes of phraseology and not the technical, might reduce the whole compass of the Statute Law a proportion not very much inferior: of the Common Law in a proportion ten or twenty times as great.'

The 'persuasion', so far at least as the statute book was concerned, was amply justified. Our legislative diction, always and to this day unscientific and haphazard, had sunk in the eighteenth century to its nadir; and, as everybody knows, it was chiefly owing to Bentham's untiring efforts that the nineteenth century achieved such (still inadequate) improvements as we now enjoy.

In other significant respects, this Essay shows the quintessence of Benthamism in the first stages of its distillation. Concurrently with the *Comment on the Commentaries*, Bentham was working out in his *Critical Jurisprudence* (*Principles of Morals and Legislation*) the doctrines of utility and 'greatest happiness', which had been suggested to him by Priestley and Hume, and which had taken complete possession of his thoughts. It is not surprising, therefore, to find the principle here asserting itself time and again, though the limits of the essay do not permit of its full elaboration. If Blackstone, instead of vapouring about

'right and wrong', 'just and unjust', 'could prevail upon himself to put the words beneficial and mischievous' (p. 83), he would be intelligible. Bentham admits, though reluctantly, that by some strange mischance Blackstone has hit upon a sound principle in connexion with 'remedial statutes'—namely, that the cardinal principle of interpretation is the *mischief* aimed at and the *remedy* proposed (p. 138); though here, for once, he loses the opportunity of a gibe, for, although the fact seems to have escaped the usually vigilant critic, this principle is not really Blackstone's at all, but comes from Coke (*Heydon's Case*). Every statute is to be subject to the supreme test of the 'benefit proposed to be obtained by it'. If for his vague 'reason' (and it cannot be denied that in Coke and Blackstone 'reason' is exceedingly vague) Blackstone had substituted 'utility' 'he would have said something' (p. 192).

'He would have referred us for a foundation for our judgement to something distinct from that judgement itself. He would have referred us to calculation founded upon matter of fact: future contingent utility founded upon past utility experienced. How have stood the stocks of Pain and Pleasure upon such a disposition of things as the determination in question is calculated to bring on? This is the question, stated indeed in the most general and comprehensive terms, which a Judge ought to put to him upon the occasion of every fresh case.'

Again, we have here an early statement of that attitude towards jurisprudence which was later to receive the lumbering title of 'deontology'—a 'science', which, though frequently misnamed, is not jurisprudence at all, but which might, to imitate Bentham's idiom, be called the 'science' of 'Desiderative Omnilegiferics' or 'Deontic Pannomics'.

'Let us reflect that our first concern is to learn, how the things that are in our power *ought to be*: that the knowledge of what they have been is of no further use, than as by pointing out the causes by the influence of which they have been brought to what they ought to be, and by which they have failed of being what they ought to be in the many instances in which they have *not* been what they ought

to be, they lead us to the knowledge of the means by which they may be brought to what they ought to be in the future:¹ that in studying what they ought to be and how to bring them to it, we shall never be out of the most arduous indeed but noblest road our intellect can travel in: that while examining what they have been, there is only this much to be said for us, that possibly we may smooth the approaches of those who mean to travel there' (p. 136).

Again (p. 147):

'Tis very rarely . . . that I should think of contending with our Author concerning what is Law. My judgement in such case goes no further than to suggest what if the matter were to be settled anew by competent authority *ought to be made* Law.'

Another characteristic feature of this Essay is that we observe Bentham already indulging his passion for the invention of terminology. At one point (p. 245) he toys with terms like law authoritative, unauthoritative, adoptive, autographic. Throughout he shows an irritable scepticism of Blackstone's use of words, constantly demands a more precise connotation, and mocks at the passing off of half-truths under the guise of Latin tags. (There was some cause for his distrust of this affectation, which had been carried to pedantic lengths by Coke; but better, it might be answered, the *lingua mera* than sesquipedalian Anglo-Latin or Anglo-Greek hybrids!) This preoccupation with terminology never ceased to engage Bentham's attention; he attempted to solve its problems by inventing a vocabulary of his own. Thereby he incurred the reproach which he levelled at lawyers, of fashioning their notions 'as unlike as possible to those of other men'; and though in some instances, such as the terms 'codify' and 'international law', he definitely added to the language, too often he merely substituted one difficulty for another. His real complaint was not against the technical terms of any particular science, but against the insuperable defects

¹ 'Internal evidence' would undoubtedly have said, were the facts not otherwise, that this tangled construction came from the old rather than the young Bentham!

of human speech in general. A long line of philosophers has experienced the same difficulty.

Such, then, are the history and general tenor of this interesting early work. The sequel to the controversy of which it formed a hidden part deserves brief mention. Although, as has been suggested, one seems to detect a certain degree of personal animus in Bentham's onslaught, he would appear to have overstated his case deliberately, and for motives which, at this distance of time, seem not altogether illegitimate. (It is not impossible that Blackstone also, having in view the low esteem in which the study of law was held, deliberately overstated his case.) Bentham was by no means insensible of the merits of Blackstone's work. In a famous passage (Preface to the *Fragment on Government, Works*, i. 236), he pays his tribute in eloquent terms:

'While with this freedom I expose our Author's ill deserts, let me not be backward in acknowledging and paying homage to his various merits; a justice due not to him alone, but to that Public, which now for so many years had been dealing out to him (it cannot be supposed altogether without title) so large a measure of its applause.

'Correct, elegant, unembarrassed, ornamented, the *style* is such as could scarce fail to recommend a work still more vitious in point of *matter* to the multitude of readers.

'He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman;¹ put a polish upon that rugged science; cleansed her from the dust and cobwebs of the office; and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the

¹ It is interesting to observe that this famous phrase is anticipated in the *Comment on the Commentaries* (p. 206 n.). There Bentham describes (not inaptly) 'Burrows's' (Burrow's) 'Reports of Decisions in the Time of Lord Mansfield' as 'the first book of reports in which the Lawyer was taught to speak the language of the Scholar and the Gentleman'. The compliment was doubtless intended not only for the reporter, but for Lord Mansfield, whom Bentham greatly admired. In later times, Bentham's phrase was happily used by Sir Frederick Pollock of Sir Henry Maine.

toilette of classic erudition; enlivened her with metaphors and allusions; and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.'

The avowed intention was to ignore these merits and to be deliberately provocative. Was Blackstone provoked? He never took public notice of his assailant, except for some indirect and dignified references in prefaces to later editions of the *Commentaries*. When asked whether he intended to reply to the *Fragment on Government*, he answered with a somewhat flat repartee, which may be construed as either dignified or sulky: 'No, not even if it were better written.' Perhaps he considered a mere amateur beneath the notice of a Vinerian Professor and a Puisne Judge; perhaps—dare one suggest it?—even in that formal age there were intelligent anticipations of the Transatlantic precept, 'Every knock is a boost'. He may have felt the same gratitude towards Bentham as the novelist feels towards the libraries which have banned him. At all events, Blackstone's sales increased rather than diminished, and the *Commentaries* became one of the most valuable literary properties in the English tongue. Bentham therefore failed in his immediate object of pulling the idol from its throne. But he did not fail in starting a counter-current of ideas which was to develop into a stream mightier even than Blackstone's flowing periods.

The antagonists never met. But Bentham tells us (*Works*, i. 255) that they were once somewhat distantly associated over a Hard Labour Bill, for the drafting of which Blackstone was partially responsible. Bentham examined and criticized it in *A View of the Hard Labour Bill*, published in 1778.

'The tone . . . tho' free, and holding up to view numerous imperfections, was upon the whole laudatory; for my delight at seeing symptoms of ever so little a disposition to improvement, where none at all was to be expected, was sincere, and warmly expressed.'

A copy of the criticism was sent to Blackstone.

'From the Judge I received a note. . . . After thanks, and so forth, in the third person—"some of the observations", said he, "he believed had already occurred to the framers of the Bill" (not mentioning himself as one of them), "and many others were well deserving attention".'

Upon this (as it would seem) courteous reply Bentham adds the not very generous comment:

'To any reader of this work, if any such there be by whom that other of mine has been perused, the frigid caution with which the acknowledgment is thus guarded—the frigid caution so characteristic of the person as well as the situation, will not have been unexpected.'

On the whole, Blackstone seems to have behaved with the dignity of age and position; and Bentham, if he acted with the impudence of youth, was subsequently to justify, not for the first time in history, the occasional blessings of impudence. Later generations can only wish peace to the bones of both these valiant disputants.

MAINE'S 'ANCIENT LAW'¹

BOOKS about law, whether it be ancient or modern law, do not usually appeal to a large audience; yet the eighteenth and the nineteenth centuries each produced a famous book, of predominantly legal complexion, which profoundly influenced the trend of contemporary and of later thought. Montesquieu's *L'Esprit des Loix* was certainly one of the most remarkable works of the French eighteenth century, and despite a certain perverseness of outlook which Maine criticized in *Ancient Law* (chap. v), it marked an important stage in historical jurisprudence. *Ancient Law* discharged an even more responsible function in the nineteenth century; indeed, so far as England is concerned, it is not too much to say that with the appearance of this book modern historical jurisprudence was born.

Although nothing that is expressed in Maine's distinguished style can ever seem commonplace, considerable portions of *Ancient Law* have, in the course of seventy years, become almost elementary to the student of legal institutions. In order to realize how original a work it was in its own time, we must remind ourselves of some of the intellectual conditions which then prevailed.

In 1758, when Blackstone, as first Vinerian Professor, essayed the unprecedented experiment of lecturing to the University of Oxford upon English law, he had to plead with his audience that the study of law was a fitting occupation for an educated gentleman; though even he would probably have hesitated to suggest that it was quite so gentlemanly an occupation as fox-hunting. Seventy years later John Austin, endeavouring (with small success) to commend to his audience at the University of London the charms and the advantages of jurisprudence, frankly acknowledged that many generous minds were repelled from the study of law by the 'disgusting' nature of the

¹ Introduction to World's Classics edition, Oxford University Press.

sources from which it was to be extracted. 'I will venture to affirm', he wrote on one occasion, 'that no other body of law, obtaining in a civilized community, has so little of consistency and symmetry as our own.' Apart from Hale and Blackstone, there was hardly anything in the nature of systematic exposition. Law was learned upon the principle of trial and error; members of the profession still living can remember the time when the law was, in the words of a distinguished and aged American judge—Mr. Justice Holmes—'a rag-bag of details'; and indeed among certain practitioners a prepossession in favour of this purely empirical, hit-or-miss method of mastering the law has not, to this day, entirely disappeared.

As for the history of English law, it was not only neglected, but scouted. Bentham, for example, saw no incongruity in proposing to rewrite the whole of English law without the slightest regard—except by way of animadversion—to its antecedents; and of him even his most illustrious disciple, John Stuart Mill, was bound to say that 'he preferred to draw his pen through the whole of the past, and begin anew at the beginning'. If this was the attitude towards the history of English law, it may be imagined how contemptuous was the feeling for any foreign system or for any comparative study of past or even contemporary legal phenomena.

This insularity was particularly noticeable in regard to Roman law. In 1816 Niebuhr had unearthed at Verona the manuscript of the *Institutes of Gaius*—certainly one of the most notable discoveries in the history of scholarship: for this treatise not only became our sole source of information concerning some of the most instructive aspects of early Roman, and indeed Aryan, law, but it had served in large part as the model upon which, some four hundred years after it was probably written, Justinian's imperishable *Institutes* were designed. England was frigidly indifferent to this capital event. In chapter ix of this book will be found Maine's scathing—and ultimately effectual—protest against 'that ignorance of Roman law

which Englishmen readily confess, and of which they are sometimes not ashamed to boast'.

England, however, was not alone in this incuriousness about the ascertainable facts of the past institutions of law and politics. All Europe was full of assumptions about the origins of political society, the law of nature, and the 'state of nature' which to the modern view seem so fantastic, so remote from anything resembling historical justification, that to-day we have difficulty in realizing how powerfully they had taken possession of men's imaginations. We have to remind ourselves, with patience and tolerance and perhaps with humility (lest some day our own settled beliefs seem equally baseless), of what Maine called 'the extraordinary vitality of speculative error'. It behoves us to remember an observation of Herbert Spencer's about 'the way in which a system of thought may be seen going about in high spirits after having committed suicide'. It is not too much to say that the prevailing notions of the eighteenth century concerning political origins, culminating as they did in the prodigious postulates of Rousseau, and still alive and breathing, if moribund, in the middle of the nineteenth century, showed scarcely any evidence of advance in a period of two thousand years. And side by side with these figments and allegories about the nature of social man was a widespread conviction that political history was a tale of retrogression rather than of development, that man and most of his institutions had declined from the happier conditions of a mythically distant epoch. The best, then, that could be done for the race, since the recapture of primitive innocence was unattainable, was, by jealously preserving the existing order of things, at least to prevent further declension.

Neglect of history, fortunately allied with more creditable causes—namely, a legitimate reaction from the transcendencies of 'natural law' and a highly opportune desire to analyse systematically the material of legal conceptions—had also produced in England a theory of law which is chiefly associated with the names of Hobbes and Austin,

and less warrantably with that of Bentham. It may conveniently be called the imperative theory of law and sovereignty. It represented law as *par excellence* the irresistible command of a legally illimitable sovereign, or 'political superior', issued to a subject, or 'political inferior', who, being assumed to possess the habit of obedience, was absolutely bound by the obligation of submission. Sceptical, and justly sceptical, of the nebulous sanctions of natural or ideal law, it concentrated the whole of its attention upon the compulsion of positive law, and resolutely declined to consider either its historical or its ethical elements. It is still much canvassed in England, though scarcely anywhere else; but there is at least general agreement that its exclusion of historical considerations from the province of jurisprudence led it into the radical fallacy of regarding all systems of law as being typified by Western European monarchical states.

But to these tendencies there were counteractions which must always be remembered in connexion with Maine's work. In Germany one of the most remarkable jurists of any age, von Savigny, had, in the early years of the nineteenth century, thrown out a vehement challenge to the unhistorical habits of thought of the eighteenth century. Though he did not actually found, he gave the principal impetus to, a scientifically historical study of national laws and customs; and the spirit in which he conceived the task of jurisprudence, brilliantly illustrating it in his own researches, has never since been abandoned, though some of its exaggerations have necessarily been modified with the passage of time. He had little immediate influence in England: Austin, who had studied in the opposing German camp, was often at issue with his conclusions: and although there is not, I believe, much evidence that Maine was intimately familiar with the writings of von Savigny and his followers, he was well aware of the general purport of their teaching and was undoubtedly in substantial sympathy with it. Probably he was more directly influenced by the great work of Rudolf von Ihering, the

Geist des römischen Rechts, which had appeared in 1858. Ihering differed from the Savignian point of view in several important respects, but certainly stood for the historical method in jurisprudence. He also brought a new and lively spirit to the study of Roman law, as against the jejune scholasticism which had long oppressed it in Germany; and there are evidences that this was a substantial stimulus to Maine, just as Gibbon had been a stimulus to Ihering himself.

The period of *Ancient Law* also witnessed one of the most profoundly influential events in the whole history of human thought—the formulation of the principle of Darwinian natural selection. *The Origin of Species* had appeared two years before *Ancient Law*. There is, so far as I have discovered, only one direct reference to Darwin in Maine's principal writings; in *Early Law and Custom*, chap. vii, he is cited as furnishing evidence from natural science in favour of the patriarchal theory of society. Whether Maine accepted the theory of evolution with all its implications is not known to the present writer; but there can be no question that his work in historical jurisprudence naturally ranges itself with the new spirit of inquiry which was abroad in the mid-nineteenth century.

Of that 'new learning', so far as it affected law, the whole of Maine's work may be regarded as a vigorous expression. He never relaxed his protest against that unscientific, uncritical, and very prevalent habit of thought which has been called, barbarously but succinctly, 'a-priorism'. 'The historical theories', he wrote in *The Early History of Institutions* (Lect. XII), 'commonly received among English lawyers have done so much harm not only to the study of law but to the study of history, that an account of the origin and growth of our legal system, founded on the examination of new materials and the re-examination of old ones, is perhaps the most urgently needed of all additions to English knowledge.' What was true of English law in particular was equally true of all law in general. In *Ancient Law* will be found Maine's first

assaults (to be renewed frequently in later writings) upon some of the most defiantly entrenched 'a-priorisms' of current political speculation: for example, in chapter iv, the dogma of 'natural equality'; in chapter v, the imaginary 'state of nature'; in chapter viii, the utterly unsupported view that property originated in the 'occupation' of objects of wealth by separate individuals; in chapter ix, the fevered surmises of the social compact. Nobody has ever stigmatized more damningly the disastrous fallacy of all these once-powerful predications: 'These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated.' For England at least, Maine may be said to have changed the face of 'nature'.

This intellectual temper made it quite impossible for him to accept the imperative doctrines of Hobbian and Austinian sovereignty as being characteristic of the genesis and the nature of all law. This is made clear at the very beginning of *Ancient Law*; it is much more fully developed in the last two lectures, published fourteen years later, on *The Early History of Institutions*. It is a curious circumstance that Maine, though one of Austin's most damaging critics, did more than any other man to commend to English lawyers the real merits of Austin's efforts after legal analysis. Austin's lectures, when they were delivered in 1828, seem to have had little effect except to deplete expectant benches; they remained without influence when they were published in 1832; and it was Maine who, both by his writings and by his lectures to the Inns of Court in 1852, rescued from oblivion the patient and disappointed labours of this earnest, this all-too-earnest, seeker after truth. But, while he accorded to Austin's analytical talents a more complimentary consideration than many later controversialists, he demonstrated beyond peradventure the

weaknesses of that view which conceived law as behest and nothing but behest.

I have already referred to Maine's strictures upon England's 'monstrous ignorance' of Roman law. In 1847 he had accepted the Regius Professorship of Civil Law at Cambridge, and *Ancient Law* manifestly profits by the bent which was given to his studies by that appointment. Much that is contained in such brilliant outlines as the account of the Roman will (chap. vi), the *legis actiones* (chap. x), *patria potestas* (chap. v), and the Roman scheme of contracts (chap. viii) has lost the novelty which it possessed in 1861; much, again, as must presently be mentioned, has become questionable. But for the reader who is unacquainted with technical Roman law there is still nothing in English which gives so spirited an account of some of the most characteristic institutions of that great system, and there is certainly nothing better than the eloquent description, in chapter ix, of the marvellous influence which it has exerted upon almost every department of European life and thought. For the reader who is not already familiar with it, a very appropriate supplement will be found in the unexcelled 44th chapter of Gibbon's *Decline and Fall*.

Maine's affinity with the evolutionary school is well shown by his convinced but by no means doctrinaire belief in certain factors of progress in the history of legal institutions. He is fully conscious of the equivocal associations of the word 'progress': 'nothing', he tells us in one of his numerous flashes of epigram, 'is more distasteful to men, either as individuals or as masses, than the admission of their moral progress as a substantive reality'; and he stands astonished (see chap. ii) at the indifference which the greatest part of mankind has shown towards any conscious effort after improvement of their civil institutions. He is never in any doubt that there are certain plain tendencies in the direction of a steady and substantial advance; thus, in the history of contract he finds a gradual emergence of the moral notion of good faith; and while he never ceased

to combat the unhistorical errors of 'natural law', he none the less saw in it a potent factor of improvement, as against the temperamental conservatism of the law, which could correct itself only by the somewhat unwieldy expedients of fictions, equity, and legislation. He was equally clear that societies naturally divided themselves into the 'progressive' and the 'unprogressive'—a dichotomy which roughly corresponded with that between the Occidental and the Oriental. The test of 'progressiveness' he hesitated to define; but in *The Early History of Institutions* he suggests at least two possible standards of distinction—on the one hand, the conscious adoption of the principle of the greatest happiness of the greatest number as the policy of legislation, and on the other hand the prevalent attitude towards the status of women. Many other tests might be mooted; none will be invariably applicable; but who will doubt that there *is* a difference between progressive and unprogressive societies, or will consider that in so believing Maine made any extravagantly complacent assumption?

Before proceeding to notice some of the more controverted elements of *Ancient Law*, it is well to have in mind one singular feature of this book. Most men, when they become attracted by a particular branch of study, examine and possibly expound its various detailed aspects before they publish (if they ever do publish) their general conclusions. Maine exactly reversed the process. His first book was that in which he stated his broadest general doctrines, and all his later works, with the exception of two of lesser importance, only served to follow out, in greater detail and with closer particularity of illustration, the principles which he formulated at the outset of his scholastic career. The method was daring, and not without its dangers: it could not have been pursued successfully except by a man with a remarkable intuitive perception of essentials. Scholars, in their anxiety for exactitude, are usually chary, and sometimes morbidly chary, of generalization; but if there is any phrase which has become threadbare in association with *Ancient Law* it is the phrase

'brilliant generalization'. There is scarcely a page in which some memorable sentence does not stand out commandingly; and the extraordinary fact is that with further investigation, long and laboriously pursued, Maine found it necessary to revise so little of his earliest opinions. This book, packed with erudition, lacks all the usual apparatus of erudition; whether from policy, or disinclination, or perhaps even inability, Maine steadfastly declined to encumber his clear and forthright text with the references and detailed substantiation which it often seems to require. Although the result may sometimes be tantalizing to the technically-trained reader, this freedom from learned impedimenta has undoubtedly added greatly to the popularity of *Ancient Law* and of all Maine's other writings. We are presented with the milk of the word without being compelled to witness the clumsy and sometimes painful process of milking. Although *Village Communities* (1871), *The Early History of Institutions* (1875), and *Early Law and Custom* (1883) all envisaged problems of early law with more exact critical examination than *Ancient Law*, nothing that Maine wrote afterwards was as good, or even half as good, as this first-born.

Ancient Law, then, must be regarded as in some sort a manifesto of Maine's life-work, which was the comparative study of the early legal institutions of the different branches of the Aryan race, especially the Roman, the English, the Irish, the Slavonic, and the Hindu. Since it is such a satisfying unity in itself, it cannot be regarded merely as prolegomena; but for fuller information about the many problems which it broaches the reader must turn to the later works of Maine. For example, the village communities referred to in chapter viii form the subject of a whole (though brief) treatise, to which they give the title, and which was suggested by the then recent researches of Nasse and G. L. von Maurer; while the account of the patriarchal family should certainly be supplemented by reference to *Early Law and Custom*, Maine's last important work, in which he took the opportunity of replying,

with equal force and urbanity, to some leading exponents of the matriarchal theory. It would be disproportionate within these limits to indicate where, in the later books, the various topics of *Ancient Law* are amplified; but among the principal may be mentioned sovereignty, early forms of collective property (one important aspect of this, the joint family, does not appear in *Ancient Law*, but is copiously discussed in *Village Communities* and *The Early History of Institutions*), the process of feudalization, ancient codes (see, for example, chap. i of *Early Law and Custom* for a fuller account of the Code of Manu), the influence of jurists (notably the Roman *iurisprudentes* and the Irish Brehons) in shaping the law, primitive arrangements of kinship, property in movables (thus a fuller description of the *res mancipi* discussed in chap. viii should be sought in *Early Law and Custom*, chap. x), property in land, primogeniture, fictions (supplement, for example, the description of the fiction of adoption by *The Early History of Institutions*, Lect. VIII, and *Early Law and Custom*, chap. iv), primitive procedure (the famous 'dramatization' of the *sacramentum* will be found again in *The Early History of Institutions*, Lect. IX), early forms of distraint, ancestor-worship and family *sacra*, and the growth of equity.

It is impossible to bestow more than the briefest glance upon the many elements of *Ancient Law* which have been the subject of later criticism and sometimes of dissent. Probably Maine's name is more identified in the public mind with the 'patriarchal theory' than with anything else. It is trite learning that an opposing school, represented chiefly by Bachofen (whose *Das Mutterrecht* appeared, by a curious coincidence, in the same year as *Ancient Law*), McLennan, Morgan, Josef Kohler, and Frazer, holds that human society began as a horde in which the sexes consorted in a state of unregulated promiscuity, that the first family groups to emerge were those of which the mother was the centre, and that the family group in which the physical strength and the proprietary jealousy of the identified male parent predominated was a comparatively

late stage in development. It will be apparent from the briefest study of *Ancient Law* and *Early Law and Custom* that the society which Maine depicts is one in which neither 'man in a state of nature', nor the maternal brood, but the patriarchal, agnatic household is the unit.

But this community which Maine reconstructed never for a moment purported to be a representation of the origin of human society as such. His inquiries were expressly limited to the Aryan race, and more particularly (but with notable exceptions, such as the Indian village community) to the more progressive branches of it; and, whatever other controversies there may be, there is no dispute that Aryan family institutions were characteristically patriarchal. In *Early Law and Custom* Maine not only disclaims, but regards with undisguised scepticism, any attempt to establish a single, invariable scheme of development for the human race in all its branches. It is exactly to this opinion that modern doctrine has come: it is now recognized as quite artificial to set 'patriarchal theory' and 'matriarchal theory' in irreconcilable antagonism to each other. The relative importance of males and females in families and in communities must have depended on many variable circumstances, such as the isolation or the contiguity of the family groups, the relative numbers of the sexes, the effects of war, the stock of wealth available for the maintenance of wives and offspring, the practice of infanticide, and many similar factors which cannot have been constant at all times and in all places. Nobody who is acquainted with even a fraction of the abundant evidence (or such of it as is reliable and does not consist of what Maine satirically called 'travellers' tales') now doubts the prevalence of matrilinear arrangements in many parts of the world. Maine has been reproached with having admitted too grudgingly the evidence for matriarchy adduced by McLennan and Morgan, and with having insisted too rigidly on the dominant factors of the physical strength and the sexual jealousy of the male. In reality, he fully concedes that patriarchy is not applicable to all forms

of society; all he claims is that it is characteristically Aryan, and that the evidences of matriarchy do not support any general theory of an aboriginal horde promiscuity. In both these latter views modern opinion upholds him; the supposition of any universal primitive promiscuity is now generally discredited, though there are numerous evidences of what may be called sexual communism as an occasional and orgiastic ebullition; and where traces of matriarchy exist among Aryans they point in all probability not to an earlier condition of this branch of the human family but to contact with the customs of non-Aryan races.

Maine's facility in phrase-making occasionally (but only occasionally) tempted him to paradox which cannot be accepted without reservation. Such a paradox meets us on the threshold of *Ancient Law*, in the first chapter of which the discussion of the semi-judicial, semi-religious *θέμνοτες* leads to the conclusion that in primitive society 'judgements preceded custom'. In *Village Communities* Maine returns to 'the power of the sovereign to create custom'. On this topic there have been two distinct schools of belief, the one holding that the earliest magisterial pronouncements were merely declaratory of already existing custom, the other that they were really the decisive factor in originating and moulding popular usage. The truth seems to lie between the opposing views. There is little doubt that early judgements, kingly or priestly, purely mundane or imagined to be divinely inspired, had great influence in settling the form, the scope, and the direction of custom. At the same time all the evidence seems to show that in the earliest ages the judicial function was conceived as being primarily directed to *the finding of the existing law*. All over the Western world there are records of this 'finding of the law' and of the accredited experts whose special function it was. Even when the process of interpretation introduced, as it is always bound to do, new elements, and when to that extent it passed beyond the declaratory to the creative, innovation still *assumed the guise* of discovery: in much the same way that English

judges, when importing what are in effect new ingredients into the law, base themselves whenever possible upon existing precedents. To this view Maine himself seems to have come upon fuller consideration, for in *Early Law and Custom* (chap. vi) he writes of the *θέμωτες* as being 'doubtless drawn from pre-existing custom or usage'; though he adds, probably with justice, that '*the notion is that they are conceived by the King spontaneously or through divine prompting*'.

No part of *Ancient Law* requires so much amplification as the account of the *ius gentium*. Its greatest defect is that it leaps across the centuries from the Romans to Grotius, taking no account of the medieval period, in which the Law of Nature passed into a theological conception of immense vitality and influence. This is a curious omission for a man of Maine's exceptional sense of proportion and perspective, and every reader who desires a more accurate impression of this long phase of juristic theory should refer, at the least, to the essays of Lord Bryce and Sir Frederick Pollock upon the History of the Law of Nature and to Dr. A. J. Carlyle's *Medieval Political Theory in the West*.

Maine's account of the development of the Roman law of contract is one of the most eloquent parts of his treatise, but it cannot be concealed that it leans a little towards the romantic. On some points he seems to have been in plain error; thus the *stipulatio*, in modern opinion, cannot be regarded as in any true sense 'a descendant of the *nexum*': it probably has an entirely different history and a different origin in *religious* sanctity. On other points, such as the exact nature of the *nexum*, some of the views which he expresses cannot be regarded as more than plausible guess-work; but this is hardly a reproach, for all the ceaseless controversy on the subject which has luxuriated since Maine's time still ends only in probabilities and inferences, and indeed, in the state of the evidence, can end in nothing else. The real weakness of Maine's historical scheme of Roman contract is the same weakness as that of the Roman jurists' own classification of agreement—namely,

its diagrammatic but deceptive simplicity. The stages presented to us by Maine are: the identification of debt-obligation with the gage of actual bodily liberty (the nexal loan), characteristically accompanied by strict sacramental formality; then the obligation by solemn verbal catechism and pledge of faith; then the irrebuttable evidence of the written word; then the 'great moral advance' of the real contracts, which represent the elementary principle of justice that he who has had, upon agreed terms, receipt and enjoyment of another's valuable chattel is under an obligation to restore it or its value; then the validity of consensus, in and of itself, in the four most common and important transactions in any society which is developing economically; and finally, through the liberal doctrines of the praetor, the binding force of pure consensus arrived at upon any serious and legitimate occasion. We cannot say that the historical sequence upon these morally progressive lines is demonstrably incorrect: but we must, in prudence, acknowledge that there is insufficient evidence to substantiate it in all its details. The truth is, as has often been pointed out, that the Romans were singularly empirical in their law of agreements; they never developed a satisfactory and consistent theory of contract *qua* contract, and their doctrine of *causa civilis*, upon which all binding agreements were supposed to be based, rested upon no solid juristic foundation. Maine leaves us with the impression that the praetors, by means of the 'praetorian pacts', which embodied 'the principle of Consensual Contract carried to its proper consequence', enlarged almost indefinitely the actionability of agreements. This is a serious exaggeration. In reality, the praetorian pacts were few in number, technical in character, and limited in scope. It is undoubted that by the classical period the sphere of contract had become comprehensive in theory and, in practice, adequate for all common purposes; but it cannot be justly credited either with the scientific symmetry or the moral consistency which Maine so enthusiastically ascribes to it.

At the end of chapter v will be found a masterly summary of the development, as Maine conceived it, of the 'Civil law of States'; and the reader will be well advised, before addressing himself to the book, to peruse the few pages beginning with the paragraph, 'We have now examined all parts of the ancient Law of Persons', and to have them well in mind as the scheme on which the first five cardinal chapters are constructed. The last words are among the most famous in the whole of English juristic literature: 'the movement of the progressive societies has hitherto been a movement *from Status to Contract*.' They were words appropriate and acceptable at the time when they were written—a time when all the forces of nineteenth-century individualism were gathering momentum. This is not the place to enter into technical discussion of Maine's use of the word 'status': as a legal 'term of art' it is, in his acceptation of it, open to several objections; but his aphorism sufficiently expresses a principle with which no historical jurist nowadays has any quarrel—namely, the emergence of the self-determining, separate individual from the network of family and group ties; or, in the briefest terms, the movement from group to individual. This was the burden of Maine's discourse, the spear-head of his attack upon all those *a priori* fantasies which had reversed the whole course of history by inventing abstract *man* as the heaven-appointed lord of the young world. It is to be observed that Maine guardedly said that this movement had *hitherto* been characteristic of the progressive societies. Many are now asking, some with apprehension, and some, it would seem, with complacency, whether the contrary movement, from contract to status, is not setting in. It is quite certain that the absolute self-determination of the individual, which nineteenth-century *laissez-faire* enshrined in the hallowed phrase 'freedom of contract', has become much modified in our own day; and the place of the individual in society is governed far more extensively by the particular grouping, especially the vocational grouping, in which, not always by his own free choice, he

finds himself, than it was when *Ancient Law* was written. It may be that the part which was once played by the family nidus will be played in the future by the syndical nidus: it may be that Maine's famous principle will some day be regarded simply as a parenthesis in social history. Whether this, if it should happen, will be the mark of progressive or of retrogressive societies is a controversial question very fitting for every thinking man's contemplation, but not fitting for discussion in this place.

There are certain minor inaccuracies in this volume to which, for the purposes of the general reader, it is hardly necessary to call attention. One, however, needs mention. In chapter iv Maine represents Bracton as having 'put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the *Corpus Iuris*'. This is gravely at variance with the facts now established by the researches of Maitland, facts which were inevitably misunderstood in 1861. Henry of Bracton or Bratton is a writer so little known to anybody but lawyers and historians that I may be pardoned for mentioning that he was a Justice of the King's Bench in the latter half of the reign of Henry III, and is our most important 'institutional' writer upon the Laws and Customs of England in the medieval period. He wrote, like all clerks of his time, in Latin: he employed the traditional classifications and arrangements of Roman law; and he was certainly indebted for considerable portions of his remarkable treatise, though for nothing approaching 'a third of the contents', to Roman law—not, however, the *Corpus Iuris* itself, but the 'revived' Roman jurisprudence of the Bolognese glossators of the twelfth century. But his work was not, either in intention or effect, in any sense an imposture: his subject-matter was honest, native, feudal law of England, though influenced, as it was bound to be influenced, by the accepted juristic method of the day—a method necessarily Romanistic.

It remains to add that one or two matters of English

law which are referred to in this book have undergone change. It is common knowledge that primogeniture, which occupies such a prominent position in Maine's work, and upon which he never looked with any favour, has now, for all major purposes except titles of honour, disappeared from the English law of succession. The prophecy, contained in chapter viii, concerning the English law of personalty 'which threatens to annihilate and absorb the law of realty' has now in large measure been fulfilled. It is scarcely necessary to mention that the disabilities of married women in England (chap. v), which in 1861 were a reproach to any civilized community, were removed in very thoroughgoing fashion twenty-one years later.

LEGAL DUTIES¹

BEYOND all the controverted questions of jurisprudence lies the master-problem whether law exists for the sake of enlarging or for the sake of restricting the liberty of man. The more one watches the eternal game of battledore and shuttlecock on the field of jurisprudential theory, the more one is aware that all differences of view, reduce them to their true joinder of issue, gravitate to that starting-point of inquiry. The problem is not solved by such celebrated paradoxes as that of Cicero, 'We are the slaves of the law in order that we may be free', any more than the elusive problem of personality, the relation between 'separateness' and 'togetherness', is solved by the cliché that we find ourselves by losing ourselves. Paradox merely gives pointed expression to a puzzling matter of observation, without attempting to explain it.

Akin to this problem is the question whether law is to be regarded primarily as a system of rights or of duties; for legal right, however we define it, must mean some enlargement, or at least some guarantee, of individual freedom of action or of enjoyment; while legal duty denotes some restriction, necessitated by the interests of others, upon self-interest. Ihering² described the 'three fundamental aphorisms of objective law' as: 'I exist for myself; the world exists for me; I exist for the world.' Does law the better enable the individual to live for himself in a world which exists for him, or the better enable him to live in a world for the sake of which he exists?

The conventional doctrines of jurisprudence return the answer that every legal system is made up, and must be made up, both of rights and duties, and that the two things are reciprocal constants. It is needless on this occasion to refer to the different kinds of rights and duties which occupy the orthodox classifications; our present concern is only with the familiar view that rights and

¹ *Yale Law Journal*, Jan. 1931.

² *Zweck im Recht*, s. 33.

duties are indissociable part and counterpart of a wide variety of legal relationships. In the view of some writers, it is of no moment which is to be regarded as part and which as counterpart. Rights and duties are 'but different aspects of the same rules and events', and for the purposes of juristic analysis it makes no difference which aspect we select for consideration, for to examine one is necessarily to examine both.

'Duty and Right', observes Sir Frederick Pollock¹ (who himself seems to regard law as primarily a system of duties, for he defines rules of law as 'the duties of subjects under the common authority of the State'²) 'are not really more divisible in law than action and reaction in mechanics. Hence it would seem that such topics of discussion as whether a system of law should be arranged under heads of duties or heads of rights are at best of secondary importance, and cannot lead to conclusions of any universal validity. The practical lawyer's instinct is to regard anxious dwelling on these topics with a certain impatience, an impatience that may be said to border on contempt. If he is pressed for reasons, and ventures to give them off-hand, his reasons are perhaps more likely to be bad than good. Yet reflection appears to show that in this as in many other cases the practical instinct is in the main justified, although it may be long before the justification is made explicit in a form that will satisfy philosophers. Experience builds better than it knows.'

Certain modern doctrines deliver bold challenge to this assumption that right and duty are the constant, co-existent, and interdependent subject-matter of law. These theories go far beyond the formal question of arrangement according to rights or duties; they will not grant the initial postulate. I propose in this lecture to consider two theories, one which holds that law consists solely of duties, and another which holds that law consists neither of rights nor of duties, but of—there I pause; for of what it does consist, in the absence of both these elements, it is not easy to see.

¹ *First Book of Jurisprudence* (6th ed.), 73.

² *Ibid.* 57.

I

The first is the positivist doctrine of Duguit. It will be appreciated that I am not now concerned with the whole of Duguit's extremely energetic and versatile teaching, but with that part of it—it is, of course, the philosophical or sociological starting-point of his whole jurisprudence—which sets forth his analysis of the true content of law.¹

Men have often been influenced throughout their whole lives by a suddenly-revealed notion contained in a single phrase. The whole current of Bentham's life was changed by lighting upon Priestley's formula, 'The greatest happiness of the greatest number'. Some such influence seems to have been exerted upon M. Duguit by a principle enunciated by Auguste Comte and cited more than once² in M. Duguit's writings:

'The decisive regeneration will consist above all in always substituting duties for rights in order the better to subordinate personality to sociability.'

The idea of rights (it is contended) really proceeded from the notion of supernatural will. In order to combat this theocratic tyranny,

'the metaphysic of the last five centuries introduced the so-called human rights, which had only a negative function; when it was attempted to attach to them any organic significance, they soon displayed their anti-social character and always tended to consecrate individuality. Every man has duties towards all, but nobody has any right, properly so called. Nobody possesses any right except the right of always doing his duty.'

This is the conclusion which M. Duguit adopts. Let us consider the process of reasoning by which he arrives at it.

¹ It is to be sought *passim* in his voluminous writings, but more particularly in *L'État, le droit objectif et la loi positive*; *Manuel de Droit constitutionnel* (Intro. and ch. i); *Traité de Droit constitutionnel* (Intro. and ch. i); and *Le Droit Social et le droit individuel*: which works are named in chronological order.

² See, e.g., *Manuel de Droit Constitutionnel*, 17.

He rejects—rightly, as I believe—the absolutistic doctrine that law originates solely with the State—i.e. the organized, personified, sovereign State of traditional political theory. (He repudiates altogether the personification of the State: the basis of all government to him is simply the *de facto* power of the stronger members of a community over the weaker.) Law originates, of necessity, with society itself. It is anterior and superior to the State.

Next, he attacks the individualistic conception of natural rights. Rights *by nature* mean nothing. It is impossible to conceive man as anything else than a social creature, involved in an inescapable plexus of relationships with his fellows. These relationships, Duguit holds, are never of rights, but always of duties. The individualist doctrine rests upon the theory of the essential equality of men, which is mere fiction. In reality, the only law which governs the individual is the social law. This is the law of *social solidarity*, arising from two 'constant and irreducible elements in society: (1) that men have certain social needs which they can satisfy only by common effort; (2) that they have certain *different* needs and different aptitudes, which they can satisfy only by exchange and by division of labour' (*solidarité par similitudes* and *solidarité par division du travail*). This twofold principle governs all the relations of men in society. 'Consequently a rule of conduct imposes itself on social man by the very nature of things, a rule which may be formulated thus: to do nothing which is prejudicial to social solidarity under either of its two forms and to do everything which tends to realize and develop social solidarity, mechanical and organical. The whole of objective law is summed up in this formula, and positive law *pour être légitime*' (a phrase which I find it difficult to translate without seeming to attribute to its author a viciously circular argument) 'must be the expression, the development or the putting into practice of this principle.'

This rule is both social and individual: social, because the whole existence of society depends on it; individual,

because it exists in the individual conscience. 'The rule is individual also in that it applies and can only apply to individuals; a rule of conduct can impose itself only on beings possessed of a conscience and a will.'

The law of social solidarity is not a constant. It changes with changing conditions. 'The rule of law, as I conceive it, is not an ideal and absolute rule, to which men should strive to approximate more and more every day; it is a variable and changing rule; and the function of the juriconsult is to determine what rule of law adapts itself exactly to the structure of any given society.' Hence its difference from 'natural' law.

This being *droit objectif*, *droit subjectif* is only a fulfilment of the same purpose. Man has *droits*:¹ but they are only *powers to do his duty*. 'They are powers which belong to him because, being social, he has a social duty to fulfil, and he ought to have the right to fulfil his duty.'

Individual liberty, then, is only liberty to develop as completely as possible one's own activity *for the sake of solidarity*. It is liberty to perform one's social duty.

Even the State is subject to the supreme objective law: 'The aim of political power is to realize *le droit*; it is obliged by *le droit* to do all that lies in its power to assure the reign of *droit*. The State is founded on force; but this force is legitimate [only] when it is exercised in conformity with *droit*. . . . It is political power placed at the service of *droit*.'

The fundamental weakness of this new 'objective law' is that it substitutes for the dogmatism of the individualistic school another form of dogmatism equally arbitrary. Duguit's 'law' of social solidarity, on examination, turns out to be a commonplace parading under a grandiloquent title. Assuredly man is social, and so are his legal rights; a society—any society, the most primitive as well as the most complex—cannot exist unless there is some

¹ I retain the French term, for we are here faced with the old difficulty of a word which expresses, and in this connexion expresses somewhat indiscriminately, three very different conceptions—law, right, and a right.

co-operation for common aims and some economic exchange and division of labour. But these are simply manifest facts of existence; it is only by metaphor that they can be called a 'law'. This seems to be admitted by Duguit when he tells us again and again that the governing factor in law is an 'objective situation': in other words, it is a state of facts which gives rise to the necessity for exercising the sense of rightness and usefulness in principles of conduct; and, on Duguit's own showing, that sense of rightness and usefulness can proceed, in the last analysis, only from the individual intelligence and conscience. Thus the existence of this supposed transcendent 'law' does not in any way relieve us of the problems of right and wrong, justice and injustice, which from time immemorial have been the battle-ground of philosophical jurisprudence. The Law of Nature did at least claim to supply authoritative solution of these *ἀνόμιαι*; Duguit's supreme law seems to leave us in exactly the same state of doubt and difficulty with which we began.

For how is the individual, loyally striving to do his duty by society, to know the law to which his actions should conform? How does it manifest itself? Clearly not through positive law; for it is a part of Duguit's theory that positive law is not necessarily the expression of the common will or the 'social conscience', but merely of those persons who happen, for the time being, to be the *de facto* governors of any particular society. It seems, then, that it must be, like the Law of Nature, 'written in men's hearts'. But much experience in the past has shown that hearts are a highly unreliable form of writing material, and that the script upon them is sometimes illegible. We are back again, then, at the old problem of the authority of positive law, and we have not advanced towards the solution of it by substituting a supposed economic norm for a supposed moral norm.

It is just as much a fallacy to call the principle of social solidarity an 'objective law' as it was to describe the Law of Nature as an 'objective law'. It certainly expresses a

manifest fact of social coexistence: but if it is to serve Duguit's purpose as a *law* of superlative authority, it must mean some ultimate and absolute principle of rightness by which these two elements of social coexistence are to be infallibly regulated. There is no such ultimate and absolute principle of truth. The factors which influence co-operative effort and division of labour must vary greatly with times, places, and societies. The law of social solidarity was one thing for Greece and Rome, another thing for modern States which are not based on slave-labour; it is one thing for the England, and another thing for the Russia, of to-day; it is one thing for the France of M. Duguit, another thing for the Italy of Signor Mussolini. What, then, becomes of our 'law'? It cannot be anything more than a belief as to the best means of furthering, in a given society, certain economic principles which are supposed to be advantageous. Just as the 'natural law with variable content' of Stammler's school ceases to be a law at all, so a law of social solidarity with variable content ceases to be a law at all. And just as a natural law with variable content, expressed in plain language, seems to mean only that law should be as morally just as possible according to the most enlightened opinion of the day, so a law of social solidarity with variable content seems to mean only that law should be as socially expedient as possible according to the most enlightened opinion of the day—if that be discoverable. In the upshot, therefore, Duguit is only aiming at what the sociological school of jurisprudence set before themselves with, as it seems to me, less a *a priori* assumption and a more pragmatic sense of the nature of their task.

Even admitting the supremacy of the principle of social solidarity, it is difficult to see why its corollary should be the tyranny of duties, to the exclusion of all rights. It is certain that a man cannot live solely for himself; it is equally certain that he cannot live solely for others. The very notion is a negation of personality. Duguit's charge against the individualistic school is that they represented

everything—society and all else—as existing solely for the self-realization of the individual. That is not quite just to eighteenth-century doctrines: it is not, for example, consistent with Kant's categorical imperative, according to which the 'freedom of all' is the ultimate aim of individual morality; but let us concede for the moment that philosophical individualists did often exaggerate the importance of *ego* in the scheme of things, just as the nineteenth-century political individualists did often exaggerate the sanctity of individual right and freedom as against the general good of the majority. Is it not equally an exaggeration to represent the individual as utterly subordinate to the general good of the majority? Be the claims of others what they will, self and self-interest must be to every creature the initial data of his very existence. Before he can live at all, whether for himself or for others, a man must have some security for existence and for self-development in relation to others who are all demanding the same security. We need not confuse the issue by calling this a 'natural' right: we need only say that human nature needs it and will insist on having it, either by the strong arm or by the arm of the law: and this security it obtains by means of rights, whether they be automatically acquired by the mere fact of being a human person born alive in an ordered society (the so-called 'rights of personality') or specifically acquired by separate acts of bargain or grant or restitution for wrongful injury. Nor is it only personal security, but the enjoyment of goods, to the exclusion of others, which the individual desires and demands by means of legal rights. Property is no doubt largely a social institution as well as an individual sphere of advantage. The conception of *dominium* as an absolutely unrestricted right *utendi, fruendi et abutendi* is impossible in modern conditions—I doubt whether it has ever been possible, except in theory, in the conditions of any civilized society: it certainly was not so in Rome. In innumerable directions property is limited by social requirements. And yet there is something little short of pleasantry in the

notion of an owner using and enjoying property solely out of a sense of duty to the law of social solidarity. He holds, intends if necessary to assert, and is permitted to assert, a claim to personal enjoyment, subject to the necessary limitations of social solidarity—i.e. in simpler terms, subject to the similar legitimate claims of others. This legal situation would not be altered even if the institution of private property were altogether abolished. Even under a system of State or communistic proprietorship, the individual would still have his assigned sphere of enjoyment and advantage, which he would and must have legal support in vindicating against infringement.

Some realization of right—not only *the* right, but *my* right—is a postulate, and the first postulate of personality: and it is therefore not a matter of indifference whether we approach law as primarily a system of rights or of duties. It is impossible to escape what Sir Paul Vinogradoff has called 'the ultimate and irreducible atom' of the human, individual will. The stark asceticism of the Kantian principle which would regard duty as the sole measure of the moral value of acts—however generous, however benevolent, however healthily pleasurable they may be—is repellent to normal instinct. Duty, it has been said, means 'devotion to the various kinds of good in proportion to their relative value and importance'. 'At bottom the sense of duty is the due appreciation of the proportionate objective value of ends.'² Self-abnegation for the sake of the majority is not the only human good, nor the only end which has objective value. Indeed, there are many circumstances in which self-abnegation is not only not a good, but is a positive evil. It may be a form of mere weakness, and not infrequently it is a form of self-indulgence. There is only one human being more tedious than the person who is for ever standing on his rights, and that is the person who is for ever standing on his duties. I seem to remember a character of that kind in one of

¹ *Collected Papers*, ii. 373.

² Rashdall, *Theory of Good and Evil*, i. 125, 128.

Ibsen's plays, and a very disagreeable, mischief-making woman she was. It is depressing to contemplate a society composed entirely of such persons. It is our duty to let live, but it is our right to live, and M. Duguit hardly satisfies us when he tells us that we shall live the more abundantly by *merely* letting live.

Nor does duty as the sole principle of conduct become any more attractive when it is owed not to individuals, but to the community. In a great deal of current theory there is a curious superstition about the peculiar virtue of what I may call *mere mass*. It seems to be thought that there is some self-sufficient sanctity in mere plurality for its own sake. An aggregate of individuals associated for a common purpose is to have the full rights and duties of legal personality merely by virtue of being an aggregate—simply because, in Maitland's phrase,¹ it 'behaves like a corporation': it is apparently more important that it should behave like a corporation than that it should behave itself. It does not seem to be contemplated as a possibility that the phenomenon of an indefinite number of groups and septs behaving like corporations may become a great social pest, not to say an intolerable tyranny over what little is left of separate individual life. Similarly a social aggregate, a community, is to be a supreme law unto itself and a supreme authority over the individual conscience simply because it is an aggregate co-operating for certain ends. There is no merit in co-operation and solidarity *per se*: everything depends on the end towards which co-operation and solidarity are directed. But solidarity in and of itself seems to constitute an irrefragable norm for Duguit: it seems to be of no interest to him to inquire into its purport. Imagine—and recent history makes the effort of imagination not excessively difficult—a community, full of social and patriotic vitality, whose vigorous co-operative effort is largely directed towards military self-assertion. Imagine—and again modern history provides ready examples—a community in which an enormous amount of co-operative

¹ Intro. to Gierke's *Political Theories of the Middle Age*, xxxviii.

vitality is directed primarily to the increase of material wealth, prosperity, and mechanization far beyond the reasonable needs of human nature. Are these types of social co-operation to be the sovereign guides of conduct for the individual? It may well be that he finds himself in such a situation that he cannot conscientiously associate in the collective activities of the society in which he happens to be placed. The communist in a capitalistic society, or the capitalist in a communistic society, is at issue with the whole conception of solidarity *par similitudes* and *par division du travail* which surrounds him. I do not know by what right we can say that the social solidarity of which he disapproves is the unchallengeable measure of his duty. Beyond doubt, the State has the power to say: 'I tell you that it is your duty to do thus and thus, and if you do not happen to conceive it as a duty, you must nevertheless pay the penalty for non-compliance. If you do not concur in what commends itself to the majority, you will yield to the compulsion of the majority.' To that ancient dilemma between sovereign command and individual conscience I will revert in another connexion. But Duguit's doctrine goes far beyond the bare power of the State to exact obedience and the coercion of the individual into law-abidingness. He offers us a transcendent, unexceptionable sanction for the 'legitimacy' of all law and for the inherent obligatory force of all legal duty. Whatever *is*, socially and by force of solidary effort, is right, and constitutes itself for the individual one great, unquestionable *ought*. It is from this point of view that his philosophy seems to me to be insufficient; and history would be the poorer if there had not been found, in all ages, individuals who took the contrary view.

Finally, what meaning is to be attached to the aphorism of Comte and Duguit that a man has only one right, namely, the 'right to do his duty'? It has the air of somewhat light-hearted epigram; but in reality it constitutes an admission of more damaging import than its authors seem to realize. For consider the practical operation of this one

little orphan right which the positivists vouchsafe us. As a loyal citizen, I am about to do my duty to social solidarity; let us say that I propose to do it by the singular method of enjoying the benefit of the property which I have acquired by my labour. Somebody attempts to prevent this meritorious effort, by physical constraint or other illegal means. I have, it seems, a right to repel the interference and even (we must assume) to obtain compensation for it. Why? Because it is in the interests of society that I should not be prevented from doing my duty to my fellows? Or because I am entitled to demand of the law that minimum of personal freedom of action, thought, speech, and enjoyment without which my life would be savourless and purposeless? I cannot think that many persons will doubt which is the truer of these two answers. Once we admit that Least Common Denominator of right, the ground is cut away from the conception of law as duty, whole duty and nothing but duty. To say that a man has no right except to do his duty is to mean either (if we are dealing in mere oxymoron) that he has no right at all, or else that he has a claim at least to that minimum of guaranteed freedom which, as it seems to me, is the starting-point of all legal systems and which is an obstacle on the threshold of an exclusively 'deontological' view of law. We are brought back to the 'ultimate and irreducible atom'; and the 'law' of social solidarity, shorn of its dogmatism, means only, from the social point of view, that the interest of each must be adjusted to the interest of all. From the individual point of view, it means that every man in the enjoyment and assertion of his right *should* be conscious of a duty to his fellows for the sake of such harmony and development of society as he believes to be for ultimate good—a good which he furthers not only because it is intrinsically good, but because he himself is one of the joint beneficiaries in it.

II

The second theory to which I invite attention is that of Professor Lundstedt of Uppsala. It is proper to say that my observations are limited to one only of Professor Lundstedt's books,¹ which is written in English; for the remainder of his numerous monographs are written in Swedish, which unhappily I do not read. I hope it is not unfair, however, to take this one book as a text, since it is offered as an epitome of Professor Lundstedt's teaching, which in its turn has been inspired by the theories of Professor Hägerström, of Uppsala.

Since Professor Lundstedt is delivering a frontal attack upon some of the most strongly fortified positions of jurisprudence, he may be pardoned a certain degree of enthusiastic offensive spirit; but it is a pity that much of his missionary zeal takes the form of violent contempt for any doctrine in which he does not happen to concur.

Lundstedt would banish utterly from the sphere of law the conceptions both of subjective right and of subjective duty. Both, he holds, are unnecessary and irreconcilable with the facts. In its briefest terms, his thesis is that rules of law arise from one source only—namely, sheer necessity for order, security, and self-preservation in society, which necessities are totally unconnected in their inception with any moral notions whatever; and that the maintenance, over a long period of time, of these rules which have been dictated by naked physical necessity, gives rise in due season to the *Rechtsgefühl* which we call the sense of right and duty, the perception of just and unjust.

Thus criminal law is based solely on self-preservation and the prevention of social disruption, not upon any principle of justice. Punishment is not deterrent in the sense that it inspires fear in the wrongdoer: its usefulness is to create a sense of duty or a moral instinct, in regard to crime, which is 'the consequence of the administration of the criminal law through generations'.

¹ *Superstition or Rationality in Action for Peace?* Longmans, 1925.

The same reasoning is applied to civil liability. The principle that restitution must be made for wrongful damage does not rest upon any 'common sense of justice' but is merely another product of self-preservation—'it is absolutely necessary to the existence of the community'. 'That the sum of money is to be paid to the injured person, and that it is estimated in accordance with the extent of the damage and not on any other basis, depends, of course, upon the fact that the interest of the community in preventing careless acts is, on close inspection, simply the interest in creating an order of society in which every citizen may live in security as regards damages for injury due to carelessness on the part of others.' The argument here proceeds in this manner: the 'culpa-rule'—i.e. the principle that imputability is to be determined by blameworthiness—arose from sheer social necessity: the maintenance of the rule in the concrete engendered a feeling of justice in the abstract: hence it was falsely supposed—reversing what Lundstedt conceives to be the true order of development—that the *post hoc* was the *propter hoc*, or, in other words, that the rules of civil liability sprang from and must always be based upon a principle of justice. Consequently a vast amount of misdirected ingenuity has been expended in trying to reconcile with the culpa-rule those cases of so-called 'absolute' liability which cannot logically be related to blameworthiness, and which become increasingly common in the conditions of modern society. So also with vicarious liability, according to which a man may be liable for an underling's wrong for which he is in no sense to blame. These forms of liability, it is urged, have no relation to justice or injustice, right or duty, lawfulness or unlawfulness: they are based solely on expediency: and the principle of expediency is that the knowledge of the liability of the harm-doer increases the general sense of security by deterring harmful acts.

Again, it is argued that the law of contract is based not upon any notion of good faith or the validity of promises, but simply upon the social necessity that undertakings for

the exchange of valuable interests must be binding. The notion of obligation here is posterior to that of economic usefulness. 'It is the maintenance of the Law of Contract during centuries that has made the phrase "agreements *must* be kept" appear in the public conscience as something valid in itself.' The whole essence of promise is simply liability to damages for breach (an idea already familiarized by Holmes,¹ and repeatedly controverted). There is no question of rights and duties either here or in torts. The whole legal situation is summed up in the simple fact that if one party does not perform his contract, or if he causes harm to another, he 'runs the risk of certain reactions detrimental to him'. Apparently the 'wrongfulness' of acts in law consists solely in the operation of these 'reactions'.

In what he calls 'political law', Lundstedt scouts the notion that the rule of law and the force of the State rest upon anything in the nature of 'common consent'. The State again is simply a creature of necessity: it is only a form of organization which is requisite for coexistence. 'It is *through* the community, and thus *through* law, that man has become a rational, and thus a judging and deciding being.'

In sum, law exists solely to prevent harm which is detrimental to the community; or, to put the proposition more positively, it exists only to confer social benefit. This is Lundstedt's conception of the meaning of legal right:²

"When using the idea of right in *science* with a *scientific significance*, we must try to realize that all these conceptions which make people talk of right as *belonging to a person* . . . and search for its *object*, pertain to ideas of non-existent things. We must try to understand that in reality "right" is purely an *abstract expression*, a *mere form*, for actual situations in which, on account of certain rules maintained by force, certain acts give rise to certain effects. Broadly speaking,

¹ *The Common Law*, Lect. VIII.

² The italics, in profusion of which Professor Lundstedt has no rival, except possibly the late Queen Victoria, are as in the original.

the position is as follows. If, in the situations under discussion, a person does not observe a certain legal rule in his relations to another person, the consequence may be that that other person will initiate certain State-proceedings to be carried out by force, either with respect to the former's person (punishment) or property (particular liability to damages). Partly through their detrimental effects, and partly by their *irresistibility* and *certain character*, these forcible proceedings exert a general *psychological pressure on a man to act in such situations in accordance with the rule*. In reality this is what one means *judicially* by "right" and "duty". As a matter of fact, "right" is nothing but an actual situation characterized by the regular absence of certain acts on the part of outsiders, which absence in its turn is due to the operation of laws consistently maintained. Taking this into consideration, one immediately understands that all talk of the "holder" or the "object" of a right is a logical impossibility: what is solely an actual *situation*, and nothing else, cannot logically have either subject or object.'

It follows that the bulk of traditional jurisprudence is founded on radical fallacies, or 'phantoms'.

The first observation to be made about Lundstedt's account of the growth of legal rules is that it rests upon historical assumptions which lack all substantiation. All pictures of the consciousness of prehistoric man are to be distrusted, and in the past they have been the source of much mischievous 'a-priorism'. Lundstedt's conception of the origin of law is very much the same as that of Hobbes—an expedient of self-preservation devised under sheer compulsion of circumstances by a naturally predatory society. To him, as to Hobbes, Necessity, far from 'knowing no law', is the fount and origin of all law. It may be so; for my own part, I decline to enter into speculation as to the habits of thought and action of prehistoric man; it may be a stimulating exercise for the imagination, but nobody has ever known it to produce anything but more or less entertaining fantasy. What seems tolerably well established is that in the earliest reliable records of primitive societies, law, far from being based on mere expediency, seems to be governed by the very definite and powerful notion of *guilt*. Wigmore,

writing of the history of liability for injury, and supporting his thesis by examples from many different systems of early law, has emphasized 'the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result'.¹ This well-established element of ancient law has been supposed—dubiously, as it seems to me—to imply a rule of mere automatic compensation for damage done, irrespective of wrongfulness—a principle expressed by some writers on the early history of our own law of torts by the highly misleading maxim that 'a man acts at his peril'. In reality this 'visible source of a visible evil result' is, as Wigmore says, an *offending* source of harm: a guilty responsibility is attributed to it: and it is well known that this responsibility was imputed, at all events when blood had been shed, even to dumb animals and to inanimate objects. The ox which gored a man to death was to be condemned, that the blood-curse might be expiated:² sticks and stones which

¹ 'Responsibility for Tortious Acts', in *Select Essays in Anglo-American Legal History*, iii. 474, 483.

² Genesis ix. 5 and Exodus xxi. 28. In English law, the animal or thing which caused injury was a *bane*, and was undoubtedly considered (e.g. by Bracton) as a real and culpable *malefactor*. Pollock and Maitland (ii. 472) write:

'Ancient law will sometimes put the beast to death, and will not be quite certain that it is not inflicting punishment upon one who has deserved it. But the most startling illustrations of its rigour occur when we see a man held liable for the evil done by his lifeless chattels, for example, by his sword. If his sword kills, he will have great difficulty in swearing that he did nothing whereby the dead man was "further from life or nearer to death". If you hand over your sword to a smith to be sharpened, see that you get it back "sound", that is to say, with no blood-guiltiness attaching to it, for otherwise you may be receiving a "bane", a slayer, into your house. But let us hear the enlightened Bracton on this matter, for old popular phrases will sometimes crop up through his rational text. "If a man by misadventure is crushed or drowned or otherwise slain, let hue and cry at once be raised; but in such a case there is no need to make pursuit from field to field and vill to vill; for the malefactor has been caught, to wit, the bane." Yes, the malefactor, the *hana*, the slayer, has been caught; a cart, a boat, a mill-wheel is the slayer and must now be devoted to God.'

As to the deodand, see P. & M., *loc. cit.*, and Stephen, *H.C.L.* iii. 77.

broke bones received the solemn judgement of a tribunal—e.g. the kings of the city and the tribes in Attic law.¹ Such instruments of evil—let alone human agents of harm and loss—were themselves, in some mysterious way, evil; at the very best, however apparently incapable of wicked intent, they were the tools of dark, unpropitious forces which were to be feared and, if expiation could accomplish it, placated. It seems to have been only by degrees that there grew up a consciousness that damage might occur by pure misadventure without any question of imputability. Whatever rationalistic notions of social expediency Lundstedt may suppose 'man in a state of nature' to have possessed, the very different notion of sinful guilt seems to have been deeply rooted in his legal institutions when we first begin to obtain trustworthy accounts of them. 'The conception of offence against God', wrote Maine,² 'produced the first class of ordinances; the conception of offence against one's neighbour produced the second; but the idea of offence against the State or aggregate community did not at first produce a true criminal jurisprudence.'³

It need hardly be said that Lundstedt's standpoint is, in the extreme degree, positivist, and it is chiefly for that reason that I am considering him in connexion with Duguit, though, as I shall presently mention, he strenuously endeavours to dissociate himself from Duguit's position. All ethical notions, in his view, are the result of experience and of experience alone; law—an 'objective situation', a fact—engenders *law-abidingness*—a moral sentiment. There is here a profound fallacy, one which has always been the vulnerable point of positivism as a system of philosophy and has withheld from it any general acceptance. A moral principle does not cease to be moral merely because it is necessary. On the contrary, all moral principles are, in

¹ See Vinogradoff, *Historical Jurisprudence*, ii. 185.

² *Ancient Law*, 381.

³ For a further discussion, of much interest even for modern theories of liability, of 'the sacral element in ancient criminal law', see P. & M. ii. 474.

a sense, necessities of existence. Doubtless there are abnormal, amoral individuals, though it is questionable whether there are any entirely amoral (sane) individuals, but it is clear that life without any moral criterion is at the best a miserable business, 'nasty, brutish, and short'. The recognition of the necessity for some kind of compromise between egoism and altruism itself proceeds from a moral impulse or intuition, which cannot be acquired by mere empiricism. What led Lundstedt's *homo sapiens* to recognize that punishment of the criminal enemy of society, the compensation of the injured plaintiff, the fulfilment of agreements, the organization of society as a State, were 'necessary'? Surely some consciousness that they were *good* and *desirable*. What led Hobbes's nasty, brutish men—wolves ravening upon each other (which, by the way, is not the habit of the best-regulated packs of wolves)—to enter into their remarkable contract of compromise? Surely some very definite appreciation of the goodness and the desirability of peace, security, 'the pursuit of happiness', and the efficacy of mutual promises—indeed, as has constantly been pointed out, a far more definite, developed and articulate appreciation of these things than can be ascribed, with any degree of probability, to Hobbes's mythical savage. It is quite illusory to attribute all the elements of ancient law—which often was a highly complicated system—solely to the instinct of self-preservation; and even if this were possible, the very impulse of self-preservation is not unconnected with moral perceptions. No doubt it and its complement, self-reproduction, are the most instinctive of all instinctive things; but it takes very different forms in man and in the brutes. We speak of 'animal courage' as if it were always admirable; often it is not so. The beast of prey, in the pursuit of immediate sensual satisfactions, such as food or sex, is reckless of its life—unsolicitous, in other words, to preserve it—in a degree which would be reprehensible in man. Men, with every step that they advance from the beasts of the field, desire to preserve their lives for the sake of things which

are worth living for: and that can only mean the development of a qualitative moral discernment. In short, to posit the adoption of the discipline of law without presupposing some moral perception of its intrinsic worth is a gross and palpable *hysteron proteron*. Lundstedt puts it in the form that 'the "nature of man as a rational and social being" is so far from being the *basis* of law that, on the contrary, it is the *consequence* of the operation of law'. I borrow again a pregnant sentence from Dr. Rashdall:¹ 'No accumulation of observed sequences, no experience of what *is*, no predictions of what *will be*, can possibly prove what *ought to be*.'

Lundstedt himself cannot escape from some ethical criterion—or, at least, in attempting to escape from it, he merely stultifies himself. He violently dissents from utilitarianism upon the usual ground of objection to that theory—namely, that by an unwarrantable assumption it erects the greatest good of the greatest number into the position of a law absolutely and objectively valid in itself. Lundstedt repudiates any such question-begging term as 'happiness'; law, he says, exists not to further anything so subjective in conception as happiness, but simply to promote objects 'which indisputably man actually strives to attain'. The one guiding principle, as with Duguit, is the 'benefit of the community'. But how is this an escape from the utilitarian position? Why is 'benefit' any less question-begging than 'happiness'? What are these *indisputable*, these *self-evident* objects of human effort and aspiration? To this question Lundstedt returns the entirely evasive answer: Is there a single one of the legal purposes mentioned by me which anybody will deny *is* manifestly for the benefit of the community? His examples are the prevention of crimes of violence and fraud by criminal law, the prevention of unjustifiable harm by the law of torts, the enforcement of promises by pecuniary damages—in short, order and security achieved by the threat of penalty. His law, like that of Bentham and Austin,

¹ *Op. cit.* i. 53.

consists solely of deterrent force. He entirely ignores the fact that a very great deal of law does not consist at all of this minatory compulsion, but of systematic adjustment of genuine doubts and difficulties concerning the exact attribution of legal rights; that large portions of law are simply the formulation of *method*; that no small part of legal contention is, to borrow a happy phrase, 'not the struggle of right against wrong, but of right against right'. The safeguarding of the bare necessities of social and private existence plainly are not the sole subject-matter of modern law. There are many matters in which it is far more difficult than Lundstedt perceives to determine what is an 'indisputable', 'self-evident' benefit to the community. Most of us nowadays, I imagine, would agree that some measure of regulation of public health is a necessary and obvious benefit to the community; it is not so long since Herbert Spencer was arguing, with the utmost conviction—and he does not lack disciples even to-day—that it was better for many to die of small-pox and slummary than for a single individual to be protected compulsorily against these evils. Cheap and widespread education has within the last century come to be a generally unquestioned function of State organization; there are those who greatly doubt its usefulness. Some measure of military organization has, up to the present, been the first care of every State which wished to survive; there are many nowadays who hold that the time-honoured method of willing peace by preparing for war is the most dubious of all benefits to the community. On none of these questions am I now venturing a personal opinion; I am merely pointing out that it is impossible to be doctrinaire about 'indisputable' and 'self-evident benefit' as the automatic generating-plant of all law. Law is established by no such mechanical means; it results from a *belief*, right or wrong, in what is good and beneficial for the individual and for society; and that belief presupposes the operation of moral and rational judgement. The Utilitarians set up a standard which proved to be far more incalculable than they supposed;

but that is at least better than adopting a standard of 'benefit'—itself a qualitative term—and then denying that it involves any qualitative considerations whatever.

The same inconsistency appears in Lundstedt's criticism of Duguit. He rightly dissents from Duguit's hypothesis of the so-called 'law' of social solidarity, holding that it suffers from the same arbitrariness of hypothesis as the Law of Nature. Yet Lundstedt's own conception of the genesis of the operation of law in society differs in no essential respect from Duguit's. To him, as to Duguit, law is an 'objective situation': and his principle of necessity imposed by the conditions of coexistence is indistinguishable from the requirements of coexistence to which Duguit gives the name solidarity, except that while Lundstedt vaguely speaks only of self-preservation, Duguit attempts, with more precision, to distinguish the two primary necessities as co-operation and division of labour. Lundstedt repudiates, however, Duguit's doctrine that the supreme law imposes a duty on the individual, and that this duty is the whole content of 'subjective' law. I have given reasons for thinking that doctrine inadequate; but it ought not, if he were consistent, to be in the least incompatible with Lundstedt's theory. If the sheer physical necessities of coexistence are the sole origin of law, how is it possible to escape duty? Law, in this view, is in no sense a positive delimitation of spheres of right: it is purely defensive, negative, a declaration of what the individual *must not* do, lest he threaten the security and the life of society: in short, a code of *ought not*. The 'ought not' is inevitable and all-pervading; and the moment it is introduced, we are in the realm of duty. Lundstedt's scheme of law is nothing but a conglomerate of negative duties, enforced by punitive or restitutory sanctions; and it differs from Duguit's only in this respect, that the latter, much more plausibly, recognizes that there are also a large number of positive powers or capacities in the individual. These—questionably, as I have suggested—Duguit refuses to recognize as rights, and considers as 'rights to do

one's duty'; but in admitting their existence, he at least takes a less limited view of the nature of legal rules than Lundstedt.

Finally, a good deal of Lundstedt's argumentation seems to be unhelpful even of his own case. Whether or not law arose from the mere animal instinct of self-preservation, or was prompted by some rudimentary moral sense—and these questions, as I have suggested, require far closer historical examination than Lundstedt bestows upon them—the fact remains, on this jurist's own showing, that a spirit of law-abidingness and a sense of the distinction between rightfulness and wrongfulness have in fact come into existence in the course of time. Why, then, social man being what he is, are we called upon to banish the notions of right and duty, of lawfulness and unlawfulness, from legal conceptions? Whencesoever and howsoever these sentiments may have originated, they have admittedly arrived, presumably they are likely to stay, and it is a little difficult to understand why we must disregard them in the systems of law with which we have nowadays to deal.

What seems to have led Lundstedt into this contradiction is his anxiety to combat the doctrine that all law, in modern society, must necessarily exist *in order to satisfy moral demands*, and that it is incumbent upon jurisprudence to find for every legal rule some ethical *raison d'être*. Now here there seems to be much force in the argument. There has undoubtedly been a tendency in a certain type of idealistic philosophical jurisprudence to see, or to imagine, in every positive law an emanation or reflex of some greater moral law, of the kind typified most conspicuously in history by the Law of Nature. This process of moralization, carried into every department of modern law, is both needless and misconceived. It is impossible to regard all contemporary law as resting upon a moral basis. Much of it has become purely administrative, functional, and economic. No stretch of imagination can discover an ethical origin for purely fiscal or financial laws

(to take only one example): and these form no small part of modern legal systems, as anybody may see by a single glance at any current number of the Law Reports.

But the undeniable fact that large portions of law cannot, without fantasy, be judged by purely ethical standards, and that some laws (though not all, as Lundstedt would have us believe) are inspired simply by exigencies of utility and the desire for systematic method—this fact does not in any sense expel duty from the sphere of law. Let us suppose that the State issues a direct command or prohibition prompted not by any ethical, but by purely economic, considerations. It commands me, for example, to pay a tax upon the cigars which I am bringing into England, and it prohibits me altogether from bringing my Tauchnitz novel into England. Here is a direct injunction the motive for which is simply economic; what is the nature of my duty in such circumstances? Lundstedt maintains that it is a moral duty, or it is nothing; he rightly declines to attach to the term 'legal duty' a purely objective meaning; for, as he urges, duty cannot in any true sense be objective—it can operate upon nothing but the subjective conscience. Does a problem of conscience arise out of legal commands and prohibitions which are of merely economic or administrative genesis? I think it does.

We may assume that the great majority of men obey the law without any nice inquiry into its justification either in ethics or in expediency. They obey partly, no doubt, because they fear the penalties of disobedience, but principally because by long habit they believe it to be right—to be their duty—to obey the law because it *is* the law. To take a former example, few persons are sufficiently acquainted with the intricacies of international copyright to understand exactly why they are forbidden to import into England such apparently harmless objects as Tauchnitz novels; yet, on the whole—there are, I fear, frequent exceptions—they obey. It is, I conceive, perfectly possible to be under a moral duty to obey a command, the reasons

for which are not known or understood, provided that the authority of the commanding person or body of persons is initially conceded and acknowledged. Such is the duty of the soldier; such is the duty of the child towards a parent's commands and prohibitions which it often does not understand; and such is the duty which most persons consider themselves to owe to the powers of government. Needless to say, if the individual denies the right of any constituted authority to order his actions, all talk of duty is idle; but such is not the normal frame of mind of men in society.

But the instinctive habit of law-abidingness clearly will not solve all questions. Conflicts between conscience and positive law are certain to arise, whether the positive law rests upon moral or upon more prosaic considerations. If I am given to reflection upon fiscal policy, and do not merely pay without question what the State demands of me, it may chance that I entirely approve of the duty upon tobacco. In paying it, then, I am both obeying the authority which is set over me and following the dictates of my own reason. But it may chance, on the other hand, that I believe the duty on tobacco to be unjust, unwise, and in every way reprehensible. I may then find that it is impossible to obey this law without violating my conscience to a degree which is intolerable to my self-respect. Or I may say: 'I disapprove of this law, but the judgement of my conscience is that *the greater good* is to obey it rather than rebel against the forces of law and order.' Which of these two courses represents the higher moral duty is, always has been, and always will be an extremely delicate point of casuistry, and in view of the infinitely various circumstances in which it may arise, there can be no invariable rule for its solution. Into that vexed question I do not enter; my point at present is simply that the very establishment of a compulsory legal rule of conduct by competent authority, whatever considerations, moral, economic, or any other, may have called it forth, imposes upon the individual the necessity of choosing whether he will or will not adapt his own particular conduct to this general

rule of conduct. That is a problem of duty, and the choice, as Lundstedt rightly but inconsistently points out, is a moral choice.

It will be observed that in discussing this point, to which I must revert, I have limited myself to laws which are in the form of commands and prohibitions and which therefore directly impose duties; and I have done so because it is this kind of law which seems to engage Lundstedt's attention almost exclusively. But I am far from suggesting that Austinian or Lundstedtian commands and prohibitions make up the whole of the law, or indeed the larger or more characteristic part of it. There are many laws which, as I must suggest presently, do not *directly* impose duties at all.

The discussion so far has led us to this point. It is impossible to eliminate subjective right from law, as Duguit would have us do; it is *a fortiori* impossible to eliminate both subjective right and duty from law, as Lundstedt would have us do. But it does not follow that *all* parts of the law must comprise the two compounded elements of right and duty; and it is the next logical step in our inquiry to consider whether certain types of laws may not confer rights without imposing duties, and whether certain other types may not impose duties without conferring rights.

III

The first of these two questions I must leave on one side. It has often been pointed out, in opposition to Austin, that many laws are not primarily imperative at all; they merely prescribe the means and the methods by which a person *may*, if he desires, effect an act-in-the-law—make a will, let us say, or a conveyance, or pursue a remedy in the Courts. These *opportunities* offered by the law clearly do not possess a counterpart in duty in the same manner as direct commands. Unable to ignore this awkward fact, Austin escaped the difficulty by the heroic method of denying that such enabling rules were laws

'properly so called' at all. Some modern writers, positing that every true legal right must have a direct counterpart in duty, prefer to distinguish these legal enablements or opportunities from rights proper, giving them the generic name of *powers*. Further distinctions are drawn between *powers*, *privileges*, and *immunities*.¹ The subject is, in my opinion, one of the most complex in legal analysis, and if I were to attempt to enter into it adequately, it would take me far beyond my present limits of time and space. I hope the omission is the more pardonable since I am concerned on this occasion more particularly with duties than with rights.

I must also ask indulgence if, with a curtness which may seem almost impertinent, I pass over one of the most controverted questions in the whole of jurisprudence—I mean the definition of a legal right. I touch upon this large issue only so far as is necessary to have before us, in what follows, a consistent meaning of legal right in its relation to legal duty. It is too well known to need further comment that of the two contending forces who have warred over the unhappy Patroclean body of legal right, the Greeks have adopted 'power', and the Trojans have adopted 'interest', as their battle-cry. In its briefest terms, the controversy represents on the one hand the advocacy of individual will for its own sake, on the other hand the insistence upon the material and social values of the objects towards which the will is directed. For my part, I am unable to see why these two aspects of legal right should be set in opposition to each other. On the contrary, they are both inherent in the notion of right and are in no sense mutually exclusive. Careful examination of the steps in his argument² will, I think, convince the reader that Ihering really admitted this, but in his anxiety to repel the exaggerations of the individualist exaltation of will above all else, he insisted disproportionately upon the element of interest and laid himself open, in a manner which I do not think represented his real view, to the charge of

¹ See especially Hohfeld, *Fundamental Legal Conceptions*.

² *Geist des römischen Rechts*, iv. part ii. tit. 1.

ignoring the factor of power. The essence of legal right seems to me to be not legally guaranteed power by itself, nor legally protected interest by itself, but the legally guaranteed power to realize an interest. That proposition, as I have said, needs far ampler discussion than I can now give it; and I advance it at this point only because, when I use the term 'legal right' hereafter I shall mean it, rightly or wrongly, in the sense which I have suggested—viz. the legally guaranteed power to realize an interest. Unless we attempt some such formulation, however arbitrary it may seem without fuller demonstration, we shall inevitably be involved in the cross-purposes which so easily arise out of the word 'right'.

With these preliminary observations, I turn to the second of the questions to which I have just referred—whether law may impose duties without simultaneously creating rights. I hope I need not again guard myself by saying that if I suggest that *some* laws may give rise to this position, I am not conceding Duguit's proposition that *all* laws do so.

The merest beginner in the study of jurisprudence knows that Austin drew a distinction between 'absolute' and 'relative' duties;¹ and we are generally warned against this dichotomy as unsound. We need not dwell upon the relative duties—relative, that is, to specific right-claims—for they are self-explanatory. Of *absolute* duties, Austin recognizes four kinds:

- (1) Self-regarding duties—e.g. the duty imposed by the prohibition of suicide.
- (2) Duties towards persons indefinitely—e.g. 'towards the members generally of the given independent society; or towards mankind at large.'
- (3) Duties not regarding persons—e.g. duties towards the lower animals; (or, we might add, the duty imposed by a prohibition of defacing some object of aesthetic, sacred, or sentimental sanctity).

¹ *Lectures* (Campbell's edition), Lect. XVII, p. 412.

- (4) 'Where the duty is merely to be observed towards the sovereign imposing it.'

Generally discredited though it is, I submit that there is more in Austin's distinction than has been allowed. I am unable to see that the duties imposed by criminal law have any true counterpart in legal right, if we employ that term in the sense which I have ventured to postulate.

Undoubtedly, the criminal frequently, though not invariably, infringes a private right in the course of committing the offence with which he is charged, and therefore he has committed a breach of duty towards an individual. So far as that individual is concerned, the duty is 'relative', and the injured person generally has a remedy to vindicate his particular right. But from the point of view of the State, the duty is absolute: i.e. it is enforced not in order to implement any specific right, but to maintain order and security. A assaults or libels B. He has violated B's right and B can by civil action enforce the duty of A which is relative to that right. But if A is criminally punished, the duty which the law vindicates is not the duty to respect the specific right of A, but the duty not to behave in a certain manner which is prejudicial to order and peace. In many cases, i.e. felonies, A cannot assert his right and enforce B's duty until the criminal law, at A's instance, has enforced B's general duty of good behaviour.¹

¹ Doubts as to the validity and even the existence of the rule were expressed in some of the earlier cases: see Holland, *Jurisprudence* (13th ed.), 338, n. 2, who goes much too far in saying that the rule 'was treated as finally exploded' in *Ex p. Ball* (1879), 10 Ch. D. 667 and *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561. These doubts seem now to have been set at rest by *Smith v. Selwyn, ubi inf.*: see Clerk and Lindsell, *Torts*, chap. iii. But the exact nature of the plaintiff's duty is ill-defined. In the tort cases, there is much talk of the 'duty to prosecute' for felonies; see, e.g. *Smith v. Selwyn*, [1914] 3 K.B. 98 and *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561, 568; and the action in tort will not lie unless criminal proceedings have been instituted by the person 'whose duty it is' to prosecute; *Osborn v. Gillett* (1873), L.R. 8 Ex. 88, *Appleby v. Franklin* (1886), 17 Q.B.D. 93. In *Reg. v. Daly* (1840), 9 C. & P. 342,

Can we then say that in these circumstances a right correlative to the duty resides in the State, or in society? We often hear in political theory of the 'right of the State to punish' or of the right of society not to have its security or its susceptibilities violated. 'Right' in this sense has an intelligible and an important meaning; but it is not, in my submission, the same meaning as that of legal right properly understood. When we speak of the right of the State or of society in this way, we seem to be saying '*it is right* that the State should punish certain kinds of conduct', or '*it is right* that certain elements of social life should not be disturbed': and round these propositions much useful discussion may turn. But what is then present to our minds is something very different from right in the sense of power to realize an interest. The power and the interest embodied in legal right are essentially the attributes of an individual, in his relation to other individuals. If right be regarded as *mere* power, no doubt the State has the 'right' to punish anything or to order anything. It can punish a man for attempting to kill himself; quite conceivably it could, in an Oriental community, punish him for not killing himself in certain circumstances. It may well have been, and for all I know it was, a rule of old Japanese law that it was a punishable offence not to commit hara-kiri when one had suffered extreme disgrace. Socrates, I suppose, would have been punishable if he had not drunk the hemlock. And similarly if legal right be regarded as *mere* interest or social advantage, then, in a sense which Duguit

344, Gurney B. said: 'The law does not authorize any private person to forgo a prosecution upon any terms.' This is questioned in *Russell on Crimes* (8th ed., see i. 133 and ii. 1778), and it is doubtful whether there is any enforceable legal duty to prosecute, though there is undoubtedly a *right* in any person to institute proceedings by way of indictment in respect of any indictable crime. The duty appears to be no higher than to *inform* the proper authorities of the crime; 'it is the duty of a man to discover the felony of another to a magistrate' (3 Inst. 140); and breach of this duty may amount to misprision of felony. *Compounding* a felony is, *scilicet*, an offence of a different nature. As to the practice of 'speaking with the prosecutor' in certain misdemeanours, see 4 Bl. *Comm.*, 363.

has much exaggerated, doubtless all legal right is *ultimately* the interest of the community. This is a point made by Austin. In one sense, he observes, absolute duties—e.g. in criminal law—

‘considered with reference to their more remote purposes . . . assuming that they are imposed at the suggestions of general Utility, . . . regard the members generally of the given political society, or they regard mankind at large.’

In civilized societies, there is always some kind of social purpose, more or less explicit, behind every rule of law. But, as Austin goes on to point out, consistently with his Benthamist beliefs, this is true, ultimately, of all rights and duties of whatever kind. Rights in the long run promote the general good,

‘although their proximate end be the advantage of the parties entitled, or the other determinate parties for whom they are conferred in trust. For example, the immediate purpose of a right of property is either the advantage of the proprietor himself, or of some determinate party for whom he is a Trustee. But the ulterior or remote end for which such rights are conferred, is the advantage of the community at large. Consequently, absolute duties, the duties correlating with rights, are not distinguishable when viewed from a certain aspect. Considered in respect of their ultimate or remote scope, all duties regard persons generally.’

In other words, the observance of legal duties is ultimately in the interest of social peace, security, and well-being.

While this is true, and indeed is truism, it is necessary, for the sake of clear legal analysis, to distinguish the ultimate general interest of society from the particularized, determinate powers of individuals to realize interests; and for that reason, the distinction between absolute and relative duties seems useful. Absolute duties are those which are imposed by a positive rule of law in what are believed to be the general interests of society, but without correlation to the specific rights of any individual or determinate number of individuals.

It seems quite unnecessary to suppose that to each one

of these duties there must correspond a determinate legal right. It is constantly stated that because a duty is owed *towards* or *in respect of* a person, that person necessarily has a right. But what is the logical basis of this proposition? Those who assert it as if it were self-evident¹ are unmistakably embarrassed by the peculiar position of the lower animals. It is impossible to say that the animal has an enforceable right not to be ill-treated,² but as it is considered necessary to fix somewhere the supposed right in this case, it is said to reside in 'the community' or 'the public'. For myself, I find it impossible to form any clear conception of a right owned by so vague a subject as 'the community' or 'the public', and I have never yet encountered any explanation of this right which goes beyond mere loose description. Why need we say any more than that the law-maker, in what he conceives to be the best interests of society, imposes a certain duty of behaviour towards animals? The moral aim of serving 'the best interests of society' is frequently and explicitly emphasized in the English case-law on this subject;³ but the 'interests of society' in such a connexion are manifestly of a different nature from the 'interest' which is embodied in and secured by a legal right in the true sense. And if 'the community' is too nebulous to be conceived as the owner

¹ e.g. Salmond, *Jurisprudence*, 240: "There can be no right without a corresponding duty [this is not here disputed], or duty without a corresponding right, any more than there can be a husband without a wife, or a father without a child. For every duty must be a duty *towards* some person or persons, in whom, therefore, a correlative right is vested." The 'therefore' is quite undemonstrated.

² But *nota* Austin, *loc. cit.* 419: "The Deity, an infant, or one of the lower animals, *as being the party towards whom a duty is to be performed*, might be said to have a right. But so, in the same case, might an inanimate thing. To call the Deity a person, is absurd." (Italics in the original.)

³ See, e.g., the leading case of *Ford v. Wiley* (1889), 23 Q.B.D. 203, where it is clear that the Court was deliberately setting a higher standard of humanity than had commended itself to at least one section of the community, viz. the farmers of Norfolk at that time. For examples, ancient and modern, of the legal restraint of cruelty to animals, and of the policy which has inspired them, see Holland, *Jurisprudence* (13th ed.), 383, n. 4.

of a legal right, it will hardly be contended that every individual member of the community has a separate right not to have his humanitarian instincts offended. In the first place, not every member of the community has such instincts; in the second place, when the offender is punished, the law is not vindicating the right of any particular individual. If you ill-treat *my* horse, I have an action in tort or contract against you—it is *my* right which you have violated. But if I see you ill-treating X's horse, it is true that I may be able to set the criminal law in motion against you,¹ but the criminal law does not exert itself in order to assuage *my* injured feelings; it punishes the breach of an express prohibition, which has been prompted by certain moral and social considerations connected with man's employment of sentient creatures for his own economic interests.² As an informant, I am merely part of the machinery of discipline—I may be even under a duty, at least in cases of felony, to set it in motion. I am in a totally different position from that of a plaintiff who appeals to the law to enforce his own right.

The difference is well illustrated by the law of nuisance. A public nuisance is a crime; he who commits it injures the general interests of society, and in the wide, loose sense 'the public' has a 'right' not to be subjected to nuisance. Yet no individual is entitled to sue unless he can show that his own particular right has been infringed, that he has suffered some specific, measurable damage or inconvenience. Others who have not been damnified to this degree have not in truth suffered any legal wrong at all,

¹ I *may*; but the right of prosecution is subject to many qualifications, such as the discretion of justices to dismiss an information and to refuse a warrant, the right of the Crown to enter a *nolle prosequi*, and the provisions of various statutes under which only certain specified persons or classes of persons may prosecute for certain offences.

² Considerations which are very differently understood by different persons; see, e.g., the two quite distinct theories which emerge from the judgements in a case like *In re Grove-Grady*, [1929] 1 Ch. 557, the one view purely ethical and humanitarian, the other purely materialistic and utilitarian.

for the mere chance or possibility of damage are not in themselves wrongs, unless they are so proximate and threatening that they can be restrained by injunction. The right of the individual who has been specifically injured is right in the true legal sense; but the so-called right of the public to be immune from disturbance of comfort is one to which it is difficult to attach any precise legal significance.

The dogma that all the duties enforced by criminal law must be correlated to rights arises from the fact, which has been already mentioned, that very many criminal wrongs are simultaneously wrongs done to individual right-interests; and it is familiar matter of legal history how slowly the notion of State suppression of malefaction became disentangled (if it has even yet become completely disentangled) from private retribution. But there are now-a-days many prohibitions of criminal law which have no such manifest effect upon private right-interests as the more obvious forms of crime, such as violence, theft, and fraud. A State, for example, compels children to go to school, or to be vaccinated, prohibits the sale of certain drugs or of alcoholic liquors, or forbids the importation of animals which have not first been quarantined. Where is the corresponding right? Doubtless the moral and physical welfare of the community are in contemplation; but can this—perhaps hypothetical—advantage really be represented as a right in the public at large not to be uneducated, or not to be smitten with small-pox, or not to be exposed to the dangers of the drug habit, or of alcoholism, or of rabies? It would be even more fantastic to suppose that each single member of the public has a right in these respects. There is no anomaly in saying that the State has imposed upon all persons within its jurisdiction a duty which is, or is deemed to be, in the interest of individuals generally, but in which no single individual has such a determinate interest as can be called a correlative right.

The State, no doubt, may have definite right-interests in the strict sense, similar to those of the individual

citizens—rights of a very different kind from the ‘right to punish’ or the ‘right to command’ or the ‘right of sovereignty’. It may enter into contracts and other relationships which give birth to rights and duties in the ordinary legal sense. In most countries other than England it accepts liabilities under the law of torts. An investor in the public funds certainly has legal rights against the State, and the State has legal rights against him. Taxation is a somewhat anomalous case. The duty upon the taxpayer is, it is submitted, absolute. It is in no sense voluntary, as are the rights and duties of the parties in a contract between State and subject.¹ The State’s ‘right to tax’, like its ‘right to punish’, is of a totally different kind from a right which springs from contract or tort. It is maintained by Sir John Salmond² that the State’s claim for taxes against its citizens consists of a large and indefinite number of rights *in personam*—in other words, it is a huge conglomerate of separate, ordinary money debts. *Non constat*.³ What distinguishes the duty of paying taxes from most absolute duties is that it is *positive*. Positive absolute duties are rare by comparison with negative absolute duties, i.e. duties to refrain from certain acts. In the case of taxation, the failure to do what one is positively commanded to do is a criminal offence. It is true that the taxpayer has certain rights of appeal to the Courts in order to decide whether he is liable to pay or what he is liable to pay; and this situation is sometimes considered analogous to that which arises between two parties who dispute a contract. In reality, it is very different. The State may permit the exact nature and

¹ Owing to the peculiarities of English Crown procedure the reciprocity in contracts between State and subject is incomplete, the grant of the *fiat* being a prerequisite to the remedy by Petition of Right; but since the *fiat* is mere matter of machinery in all bona fide contractual claims against the Crown, its existence is not sufficient to constitute any essential difference between these and other contracts.

² *Op. cit.* 260.

³ In *Seaman v. Burley*, [1896] 2 Q.B. 344, the Court rejected the contention that *rates* constituted an ordinary money debt.

incidence of its command to be interpreted by its tribunals—as it does, indeed, in all penal matters—but that does not alter the fact that its demand is imperative and imposes an absolute, irresistible duty, though the precise *extent* of the duty may vary. All contract implies promise, but there is no element of promise here: there is simply demand on the one side and liability on the other, subject only to the machinery of judicial or quasi-judicial assessment. The correlative of the taxpayer's duty is the authority of the State over its subjects—a kind of power very different from that right-power which, in the case of private legal rights, is guaranteed to individuals by this same authority of the State.

It seems, then, that all duties enforced by criminal law are of a different kind from those imposed by civil law, inasmuch as they do not correspond with determinate rights vested in persons or aggregates of persons, which I believe (following Austin), are the only true rights in law. It is, however, unnecessary to go beyond this and enter into Austin's subdivisions of absolute duties. For example, his so-called 'self-regarding' duties do not differ in essence from any other duties of criminal law. He takes the examples of suicide and drunkenness. But the duty not to kill oneself and not to intoxicate oneself are not, in contemplation of law, duties owed to oneself: they are duties not to disturb public order or to shock normal sensibilities: which is well shown by the fact that drunkenness is not a crime unless, in some degree or other, it threatens the King's peace. So far as I am aware, there is nothing in English law to punish a man for getting drunk, even unto delirium tremens, in the privacy of his own house.¹ Whether

¹ A person may be convicted of being an habitual drunkard under the Inebriates Act, 1898, but only when he is already charged with a criminal offence. At least two old Acts—the 4 James I, c. 5 and the 1 Charles I, c. 4—appear to impose, in very general terms, penalties for drunkenness merely as such; but their main purpose seems to have been to restrain *public* inebriation in ale-houses. There has been a long course of legislation on the subject, but most of it has been directed against public scandal rather than private vice. Before the seventeenth century, this

or not it be otherwise in morals, in law a duty owed to oneself is a flat contradiction.¹ Whenever the law imposes a duty on the individual in respect of his own person, liberty, or property, it does so not in the interest of the individual himself (except in so far as he shares in the general welfare of society), but in the interest of the community or of some section of the community. Again, 'duties in respect of things or animals' fall, as we have seen, under ordinary criminal prohibitions, except that when the things or animals are regarded as objects of property, the duty to compensate the owner for injury is clearly a relative duty. Further, the case specially disengaged by Austin, 'where the duty is merely to be observed towards the sovereign imposing it', does not seem in reality to stand apart from other absolute duties. The example given is that of treason; but there is no sufficient reason for detaching this from the general body of crimes against public order. And finally, Austin's classification of some duties as being owed 'towards the members generally of the given independent society, or towards mankind at large' seems intended only to express the principle, already mentioned, that the observance of all absolute duties *ultimately* enures, or is intended to enure, to the advantage of all members of society and indeed of all the human race. Whether they do so or not of course depends upon the degree of wisdom or unwisdom which inspired their imposition. There is much evidence in history that the legislation generally took the form either of giving justices power to suppress disorderly ale-houses, or of penalizing the keepers of them. These restraints were constantly evaded, and in 1627 came the beginnings of the modern system of licensing. See Holdsworth, *H.E.L.*, iv. 514 f. and 4 *Bl. Comm.*, 64.

¹ 'In our complex state of society, there may be few duties which are absolutely and solely self-regardant; but such duties may be conceived. If a ship, laden with Medford rum, be wrecked on a desert island, although the owner be the sole survivor, and although he have no hope or chance of rescue, it may yet be his duty not to pass his time in drinking up the cargo': J. C. Gray, *The Nature and Sources of the Law*, 9. With respect, it is impossible to see that the duty of sobriety in such circumstances is in any sense a legal duty.

indiscriminate creation of a distracting number of absolute duties, supposed to be of an improving tendency, does *not* always operate to the advantage of 'mankind at large'.

IV

It is necessary, in view of certain growing tendencies in modern law, to draw a distinction between absolute duty and what has come to be known in the law of tort as 'absolute liability'. (Some writers, justly, as it seems to me, prefer the term 'strict liability', since the considerable exceptions to the rule make the word 'absolute' inappropriate.)

The general features of 'absolute liability' for dangerous things, especially those which are connected with the possession of land, are too familiar to need discussion. Nor is it necessary to mention that this form of liability is a storm-centre of controversy, some holding that it represents the only practicable principle of civil liability in modern conditions, others that 'liability without fault' is inimical to the whole *rationale* of civil liability. It is often said that in respect of peculiarly dangerous things, there is a 'duty' irrespective of negligence or wilful aggression, to 'insure' neighbours and others against damage. Thus, going to the fountain-head, we read in *Rylands v. Fletcher*:¹

'What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of the land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether *the duty which the law casts upon him*, under such circumstances, is *an absolute duty* to keep it in at his peril, or is . . . merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more.'

This use of the term 'duty' is unfortunate, and is rightly

¹ *Per Curiam*, in the Exchequer Chamber, *sub nom. Fletcher v. Rylands*, L.R. 1 Ex. at p. 279. Italics are inserted. The passage is cited and discussed by Lundstedt, *op. cit.* 91.

attacked by Lundstedt. There is, of course, a duty of careful management of any material thing, whether it belong to the family of 'Rylands v. Fletcher objects' or not; but it is difficult to see that there is any 'duty' to prevent a dangerous thing from escaping through causes which have nothing to do with the maintainer's fault: or that a common carrier is under a 'duty' to prevent articles bailed to him from being lost by theft or misadventure: or that a principal is under a 'duty' to prevent his agent from committing actionable wrongs within the scope of his employment. The true situation seems to be that he who maintains for his own advantage a peculiarly dangerous thing in proximity to others, necessarily imposes upon those others a risk of injury, wrongful or merely accidental, greater than is to be reasonably expected in the ordinary circumstances of social life; and it is therefore just and expedient that he himself should bear the risk of making good any damage to others which results from the maintenance of the object. This is certainly a liability, but it is a confusion of ideas to call it a duty. The true doctrine is described more simply and, it is submitted with respect, more accurately in the words which follow the passage cited above in the judgement of the Exchequer Chamber: 'If the first [view] be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, *is responsible for* all the natural consequences of its escape.' A man may be responsible *ex post facto* for damage which has in fact occurred without being under a duty *ab initio* to prevent damage which is, by hypothesis, unpreventable by ordinary diligence; thus an employer may be responsible for purely accidental harm which has happened to a workman without being under a duty to prevent it. There is, of course, a duty to pay money by way of compensation when the damage has been established in fact and judgement has been delivered in law; but it need hardly be said that this duty by matter of record is of a different nature from the so-called 'absolute duty to prevent the damage'.

Another problem of absolute duty arises with regard to sins of ignorance. A man commits a criminal offence in ignorance that it is unlawful: everybody knows that he is nevertheless liable to punishment. But how can it be said that he has committed a breach of duty when he was unaware that he was ever under the duty? Lundstedt¹ appeals to this undoubted legal principle in support of his thesis that criminal law has no connexion with moral notions, but is pure matter of material expediency. With this I cannot agree, though I think Lundstedt rightly objects to the notion that there is in these circumstances a 'legal duty' as distinct from a 'moral duty', for in reality there cannot be any duty whatever for a person who has never been made aware that he ought or ought not to behave in a certain manner. I am old-fashioned enough to cling to the conventional explanation² that the rule *ignorantia iuris neminem excusatis* is really based on considerations of evidence. The fact is that in the vast majority of cases when accused persons say that they did not know the law, it is impossible to believe them; or at all events, the evidence of their own mere assertion (for usually there can be no other evidence) is too insubstantial to be set against a positive rule of law. This is the more true when we remember how easy it is for us all to persuade ourselves after the event (when it is convenient to do so) that we were mistaken before the event—a fact which is constantly illustrated in evidence concerning mistake and *dissensus* in contract. But it is objected³ that if the rule be purely evidentiary, then supposing that it can be conclusively proved in any particular case that the accused was in fact ignorant of the law, he should not be held accountable—which, however, is not the law. I do not think that this follows. In the very rare cases where this situation may arise, the law says, and is reasonably entitled to say: So

¹ *Op. cit.* 36.

² See, e.g., Austin, Lect. XXV; and cf. Lord Ellenborough in *Bilbie v. Lumley* (1802), 2 East at p. 472.

³ e.g. by Holmes, *The Common Law*, 47.

dangerous, so subversive, would it be to allow mere ignorance to be pleaded, that the defence cannot be admitted in any circumstances, and the principle must be preserved at all events. Such adherence to principle at the cost of individual hardship is sometimes necessary in any system of law. Fortunately, however, the matter does not quite end there: there is in every civilized body of law a prerogative or discretion of pardon which exists precisely for the purpose of mitigating intolerable individual hardship while leaving the general principle of liability intact: and it is well known, to take a famous example, that it was this instrument which averted what would have been a grievous severity in the case of *R. v. Bailey* (1800), Russ. & Ry. 1. This last is, so far as I know or can discover, the only recorded case in which ignorance of the law has been established beyond doubt by the defence as matter of fact.¹

V

My final topic is a brief consideration of certain aspects of an ancient and difficult problem—the relationship between moral duties and legal duties.

The distinction usually drawn is that moral duties are

¹ *R. v. Esop* (1836), 7 C. & P. 456 (unnatural offence) and *Barronet's Case* (1852), 1 E. & B. 1 (duelling), were both cases of foreigners who claimed, without convincing the Court (not that this could have made any difference), that what they had done was lawful in their own countries and that they were unaware that it was unlawful in England. It is manifest that a defence of this kind, based on foreign law, could never be allowed without throwing the administration of justice into confusion; and further, the act in both cases was wrongful in itself, within the principle stated by Bramwell B. in *Reg. v. Prince*, ante, p. 106. In *R. v. Crawshaw* (1860), 30 L.J.M.C. 58 (lottery) the jury did not go beyond saying of the accused that 'perhaps he did not know that he was acting contrary to the law'. *R. v. Wheat and Stocks*, [1921] 2 K.B. 119 is an interesting case. There a man of little education, who was petitioning for a divorce under the Poor Persons Rules, and who was charged with bigamy, convinced the jury that, on the strength of a statement by solicitors that they could 'now proceed in the matter' and would 'lose no time over your petition', he honestly believed that he was free to marry the female accused. In holding that there was no evidence on which the jury could reach this finding, the Court of Criminal Appeal

those which are enforced by the sanction of the individual conscience, while legal duties are enforced by physical or material sanctions imposed by extrinsic and irresistible might. This distinction, though on the face of it deceptively plausible, is, I believe, in essence unsound.

Duty cannot be enforced by anything but individual conscience. When we speak of the legal enforcement of legal duties, we mean rather the operation of prescribed legal penalty for non-compliance with certain express commands or prohibitions. This extrinsically-imposed penalty for disobedience is not the same thing as the enforcement of the *duty*, for to say this is to presuppose that the sovereign command is a duty to the individual. It is not necessarily so: that is a matter which can be determined only by moral judgement. King Herod commands the Massacre of the Innocents, and Mary evades the command. She might have been put to death for her disobedience, but it could hardly be said that her execution would have been the enforcement of her *duty*. That proposition would place the determination of moral duty entirely in the hands of the person or body of persons which has the *de facto* power to enforce commands; and that is surely impossible, whether the commanding authority be an enlightened government or a crazy tyrant.

I am now considering those parts of the law—and, as I have said, they are by no means the whole of the law—which directly impose duties of feissance or non-feissance. Out of these commands and prohibitions I conceive that the following moral situations may arise for the individual who is subject to the law:

- (1) His conscience approves the command: he obeys it: he has fulfilled a duty, and his act is moral.
- (2) His conscience approves the command: he disobeys it: he has violated a duty, and his act is immoral.

seems really to have been saying that there were insufficient grounds on which reasonable men could believe the accused's (certainly 'tall') statement.

The dicta in *Burns v. Nowell* (1880), 5 Q.B.D. at p. 454 seem difficult to reconcile with *R. v. Bailey, ubi sup.* (which was not considered).

- (3) His conscience disapproves the command: he obeys it merely through fear of incurring a penalty: he has violated a duty, and his act is immoral.
- (4) His conscience disapproves the command: he obeys it in the belief that the greater good is to obey rather than rebel against constituted authority: he has fulfilled a duty, and his act is moral.
- (5) His conscience disapproves the command: he disobeys it in the belief that the greater good is to stand by what he considers right rather than yield to authority: he has fulfilled a duty and his act is moral.
- (6) His conscience does not critically examine the particular command: he obeys in the belief that it is right to obey whatever the law commands: he has fulfilled a duty and his act is moral.
- (7) His conscience does not critically examine the command: he obeys merely through fear of penalty for disobeying anything which the law commands: he has neither fulfilled nor violated a duty: his act is amoral.
- (8) His conscience does not critically examine the command: he disobeys it because, in general, he prefers his own interest and advantage to any submission to authority: he has violated a duty and his act is immoral.

There will not be much dispute about Cases (1), (2), and (8). If Cases (3) and (7) be correctly stated, it follows that acts which are immoral or amoral may be not only not unlawful, but highly lawful and law-abiding: and startling though this may seem on the surface, there is really nothing in it shocking or contrary to social interest. If Case (6) be correctly stated, I so far agree with Professor Lundstedt as to believe that a good deal of law-abidingness is instinctive and automatic rather than deliberate and reflective: but I disagree with him in thinking that this forms the entire basis and substance of lawfulness. It is Case (5) which presents the most thorny problem both of law and of morals. It seems subversive of all legal

authority to say that ultimately the individual must decide for himself whether he ought or ought not to obey a given law; yet there is no escape from the final test of the subjective conscience. The precept of rendering unto Caesar the things which are Caesar's cannot be, and was never intended to be, an absolute moral rule for all circumstances; and no general duty of citizenship and orderliness can alter the fact that it *may* be an imperative moral duty to refuse obedience when obedience would mean betrayal of what is sincerely believed to be the highest right. It follows that the law may sometimes have to punish what are unquestionably moral acts and indeed in some circumstances courageous and admirable moral acts. History abounds with examples of them.

But fortunately, in well-regulated and healthy modern States, this painful situation is comparatively rare, and, we may hope, tends to become rarer; and this for two reasons. First, because of the considerations suggested by Case (4). It is highly improbable that any person alive approves morally of all the laws which govern him: but in the great majority of such disagreements, the clear decision of average moral judgement is that the greater good and the higher duty are to submit to the forces of law and order rather than disturb the peace by insisting intransigently on individual opinion. Some compromise of principle is recognized as necessary on some occasions by all wise men; and there are few who really believe it to be right and good to defy the law for every petty dissent from its policy. Second, laws do not in fact commonly violate normal moral sentiment. Many of them, belonging to that large department of law which we call common or customary, *ex hypothesi* cannot do so, since there is an element of popular practice and approval in their very genesis. As for statutory rules, they do not commonly violate normal moral sentiment, for the excellent reason that they dare not. The average law-abiding spirit will, as I have said, make a reasonable compromise, but not an intolerable sacrifice, of principle. The result of attempting to enforce commands

which do not accord with the ordinary sense of duty will only be disobedience on such a scale that the mere terrorism of legal penalties will not effectually cope with it. If government rests upon the consent of the governed, so does the strength of legal commands ultimately rest upon the consent of the commanded.

The converse of this proposition is that law tends to reinforce by commands and penalties the more elementary moral duties of respect for the property, lives, liberty, and general well-being of others. This it does not for the schooling of the majority of citizens, who already observe these moral duties; rather it voices, and more clearly formulates, the sentiment of the majority with the object of protecting it against the ubiquitous minority which is indifferent or hostile to such elementary dictates of ethics.

I do not deny, however, that it may often be the duty of the law and of its officers to do more than merely echo average morality. There are circumstances in which it will be discharging less than its true function if it does not furnish a stimulus and an example to average morality. Popular opinion may, in some communities, entirely approve the lynching of certain offenders for certain offences; but it would be a strange state of the law which sanctioned this practice. The criminal law of England effectively stamped out what the 'honour of gentlemen' approved and, indeed, demanded—the practice of duelling; and we have seen the same process of moralization in regard to the treatment of children, the regulation of the drink traffic, and, more dubiously, perhaps—certainly more unscientifically—gaming and wagering. Nevertheless, it is clear that the law cannot soar too ambitiously above the morality of common clay. If it demands of John Styles moral standards of conduct beyond his normal capacity, it incurs the same danger as when it violates the more obvious promptings of his homely conscience—the danger, namely, of disobedience and futility. Hence it is that there are many duties recognized by the highest morality which are not translated into legal commands.

But it is easy to speak of 'average' morality and 'the highest' morality. What are they? What is the difference between them? How does the law discern that difference? It is very difficult to describe the process with any precision; but it is one of the most interesting attributes of the judicial office in English-speaking countries—an attribute which, under the influence of sociological theories of jurisprudence, has become the envy and the exemplar of Continental countries—that our judges have always kept their fingers delicately but firmly upon the pulse of the accepted morality of the day. One of the most fascinating and most important doctrines of English common law—the doctrine of public policy—has, strangely enough, never been systematically and thoroughly expounded: a great opportunity awaits the man who is prepared to study exhaustively its history and its many social implications: and he will find, as I am sure every thoughtful student of law must have felt, innumerable examples of the process to which I have referred. It is both moral and economic. The history of the law consists very largely of the gradual emergence of moral and material interests which come to be recognized as deserving and indeed demanding legal protection. It is one of the highest attractions of the profession of the law that its intelligent pursuit brings its practitioners into touch with every aspect of social and private life, and that on the whole, in the English system, it makes wise and observant realists of the men who pass from its infinitely instructive apprenticeship to the responsibilities of judicial office. We all know how the judicial conception of the policy of the day has entirely changed the doctrine of restraint of trade; and it is very significant to observe how, in the great *Nordenfelt Case*, [1894] A.C. 535, the majority of the Lords quite candidly avowed that whatever the policy had been in the past, the time had come deliberately to change it. Only the other day the President of the Probate, Divorce, and Admiralty Division felt himself so doubtful about the traditional principles affecting the discretion of the Court to grant a

decree of dissolution to a petitioner who had himself (or herself) been guilty of adultery that he called in the assistance of the Attorney-General (on behalf of the King's Proctor) to argue the whole historical development of the matter; and I commend the case to anybody who is interested to observe how judicial standards keep touch with fluctuating moral sentiments.¹ Let me take one other small example from many which might be selected. There is at least respectable, though not very powerful, authority for the proposition that a husband has at Common Law a right to take possession of the person of his wife by force and to administer moderate chastisement to her.² But it is dead: judges nowadays have no hesitation in saying that they would simply ignore the right, if it ever really existed. When the question came before the Queen's Bench in 1891,³ Lord Halsbury L.C. dismissed it in these summary words:⁴ 'Such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country.' *Cochrane's Case*, 8 Dowl. 630, a nineteenth-century authority to the contrary, was unequivocally overruled. This is only one incident among many in the long history of liberal judicial policy towards married Englishwomen; it is well illustrated by the response which Equity made to public opinion long before the legislature could be induced to do so; and each of these incidents, great or small, is significant; for, as Maine perceived,⁵ the prevailing attitude towards women is one of the most symptomatic points of difference between the 'progressive' and the 'unprogressive' societies.

'Progressive' is, I know, a discredited word nowadays:

¹ *Apted v. Apted and Bliss*, [1930] P. 246.

² The authorities are collected in *Reg. v. Jackson*, [1891] 1 Q.B. 671. Blackstone (1 *Comm.* 444) is clear on the point, though some of the authorities which he cites (e.g. 1 Hawk P.C. 2) seem doubtful.

³ In *Reg. v. Jackson, ubi sup.* And see Halsbury, *L. of E.*, xvi, 318, note (r).

⁴ At p. 679.

⁵ *Early History of Institutions*, 339 ff. See *ante*, p. 146.

yet I believe that in the history of societies we may see moral convictions gradually taking more and more definite shape in the public mind, and, as they crystallize, becoming recognized as factors in the legal system and being strengthened with the law's coercive sanctions. Sometimes the law shows an excessive timidity in taking its cue from advancing morality: for example, at the present time I think that English law is unnecessarily reluctant to restrain what sound public opinion condemns and what many other systems have found no difficulty in forbidding—I mean the unconscionable exercise of legal right. But in other matters we can see the moralizing process plainly at work; and by way of conclusion I should like to consider briefly one example which seems to me of peculiar significance.

There is no duty more essentially moral than the altruistic duty; indeed, to a great extent, morality *is* altruism. Every lawyer will know what I mean when I say that as a general principle our law has shown itself extremely chary of altruistic duties. The conservative view has been that to demand of the average man that he should sacrifice his own clear interest to that of another is to expect of him a morality beyond his capacity and therefore to commit the injustice of addressing to him a command which he is unable to obey. But at the present time we may observe an increasing recognition of purely altruistic duties in law.

VI

There are, I conceive, four principal ways in which an altruistic act may give rise to legal rights or duties. (1) It may be commanded by the law as a positive duty. (2) Its altruistic motive may be set up as a defence to an act which would otherwise be illegal. (3) It may be the foundation of a claim for reimbursement. (4) It may be the foundation of a claim for compensation for injury sustained in saving one person from the consequences of the wrongful action of another.

(1) J. C. Gray has pithily observed¹ that 'the utmost to which our neighbour has a right is that we should treat him as if we loved him'. Even this, perhaps, puts the matter too strongly: we may say without cynicism that the law generally requires only that we should not treat our neighbour as if we hated him. It is difficult to demand more through the instrumentality of a policeman. And yet the results of pressing this principle to an extreme are sometimes absurd, and contrary, it would seem, to a very moderate standard of average morality.

'A woman's head-dress catches fire,' wrote Bentham:² 'water is at hand: a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?'

Who indeed? There is no satisfactory answer to Bentham's question:

'In cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?'

The distinctions sometimes drawn between self-interest and altruistic motive are really of very little logical merit. Thus in two recent cases it has been laid down that immediate physical danger to oneself is a just cause for leaving employment, while immediate physical danger to one's family is not;³ whereas in other branches of the law it is trite learning that peril or threat to near kin has much the same effect as duress to oneself,⁴ and in criminal law

¹ *The Nature and Sources of the Law*, 9.

² *Morals and Legislation, Works*, i. 148.

³ *Bouzourou v. Ottoman Bank*, [1930] A.C. 271, *Ottoman Bank v. Chakarian*, [1930] A.C. 277.

⁴ 1 Roll. Abr. 687; *Williams v. Bayley* (1866), L.R. 1 H.L. 200.

is an excuse in nearly the same degree as self-defence and is an extenuation in nearly the same degree as provocation to oneself.¹ If A, a trespasser, commits, on the land of B, what amounts to a public nuisance, B, though innocent of any wrong, is apparently under an absolute duty to abate the nuisance within a reasonable time of becoming aware of its existence—at all events, he may be indicted if he does not. But if in similar circumstances the nuisance affects only the comfort of C, and not the public generally, then, according to a majority of the Court of Appeal, B is under no duty to abate the nuisance for the benefit of C: and since C has no remedy in trespass against A, it would seem that he must endure the inconvenience with what equanimity he can, except that he may resort to the dubious and dangerous remedy of abatement.²

No doubt the obstacle, in legal theory, to Bentham's desideratum is the difficulty of placing a precise limit to altruistic duty. If it is to be a duty to lift the drunken man from his puddle, is it to be also a duty to plunge into the deep, being a poor swimmer, to save a drowning man? Are you, in short, to be your brother's keeper? The man on the Clapham omnibus acts reasonably, if, seeing his omnibus swaying dangerously, he 'jumps for it' and breaks his leg, though the event proves that he would have been safe if he had kept his seat;³ but to ask him to fling himself in front of a charging omnibus in order to save a child from its onslaught is to force upon him a higher righteousness than is known or practised in Clapham. Too much may be made of this dilemma. It ought not to be impracticably difficult to establish by evidence when and when not the effort of rescue may be made without unreasonable jeopardy to self, any more than it should be impracticably difficult, in my submission, to

¹ 2 Inst. c. 9. 316; 12 Rep. 87; 1 Hawk. P.C. c. 31, s. 37; 3 Bl. Comm. 3; 3 Salk. 46. See *ante*, p. 85.

² *Att.-Gen. v. Tod Heatley*, [1897] 1 Ch. 560; *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341.

³ *Jones v. Boyce* (1816), 1 Stark. 493.

judge with reasonable probability when Mr. Pickles is abstracting underground water in the pursuit of a legitimate interest and when he is doing it merely to hold a pistol at the heads of the Mayor and Corporation of Bradford.¹

Some limits to the *summum ius* are manifestly necessary, and they already exist in the Common Law, though faintly and timidly. X wrongfully creates a trap and Y, without negligence, is about to walk into it: Z, a disinterested third person, though well aware of the danger, may lawfully watch Y injure or kill himself without so much as uttering a word of warning. But 'put case', as Browning has it, that X, a workman, has, quite legitimately, made a dangerous hole in the staircase of an untenanted house. Y comes with an 'order to view' the premises from a house-agent. X is guilty of negligence if he does not warn Y of the trap. It seems, then, that *if a man has himself created the source of danger*, he is under a duty to warn any person whom he sees [lawfully?] exposing himself to that danger, although he did nothing wrongful in the first instance in creating it, and although there is no contractual relationship between him and the person whose safety is threatened.²

A more positive conception of altruistic duty exists in some branches of the criminal law, and breach of it, at all events if it be self-imposed and 'partly performed', may amount to manslaughter, or even murder. In *Reg. v. Marriott* (1838), 8 C. & P. 425 an old lady of seventy-three was left alone, helpless, and weak in mind and body, her sister having recently died, leaving her a small property. The prisoner, though not related to her, induced her, with motives which are difficult to interpret charitably, to live in his house, and for a time treated her with reasonable

¹ *Mayor &c. of Bradford v. Pickles*, [1895] A.C. 587. See *ante*, p. 100.

² *Kimber v. Gas Light & Coke Co.*, [1918] 1 K.B. 439; cf. *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640; *Parry v. Smith* (1879), 4 C.P.D. 325; *Excelsior Wire Rope Co. v. Callan*, [1930] A.C. 404; *Mourion v. Poulter*, [1930] 2 K.B. 183.

consideration and supplied her with necessaries. Probably her obstinate longevity proved irksome; at all events, she was later treated with great inhumanity, and appears to have died chiefly of cold and starvation. Patteson J., although admitting that the accused owed no duty which the old lady could actually have enforced against the prisoner,¹ directed the jury that if his conduct was deliberately designed to produce fatal results, it amounted to murder, and that if it was merely inhuman neglect, it amounted to manslaughter. A somewhat lenient verdict of manslaughter was returned.

Again, *Reg. v. Instan*, [1893] 1 Q.B. 450 was a case in which ingratitude met with its just reward. The accused, a woman of full age, lived in the same house as her aunt, an aged lady, and upon her bounty. The aunt fell victim to a distressing complaint which prevented her from looking after herself: probably it was fairly obvious that her days were numbered, but the niece decided to hasten the course of nature, and for ten days before the invalid's death kept her without food, nursing or medical attendance. It was not charged against her that she had done more than accelerate death, but she was found guilty of manslaughter. Lord Coleridge C.J., in the Court of Crown Cases Reserved, put the principle of liability upon the broadest possible ground: 'It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that

¹ The words of Patteson J. are interesting: 'The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether, from the way in which the prisoner treated her, he had not *by way of contract, in some way or other*, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing. . . . This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though, *if he broke that contract, he might not be liable to be indicted during her life*, yet, if by his neglect her death was occasioned, then he becomes criminally responsible.'

which is a moral obligation without legal enforcement.' I venture to commend these words to Professor Lundstedt, though I fear they would only be brushed aside with contempt.¹

(2) There are many circumstances in which an act which would otherwise be illegal may be justified on the ground that it was done for the plaintiff's benefit and with motives morally good and charitable. It is inconceivable that it should be an actionable assault to hold and bind a person who, in an epileptic fit or other derangement, is likely to do himself or others a mischief,² though I know

¹ With these decisions it is extremely difficult to reconcile *R. v. Shepherd* (1862), Le. and Ca. 147, which appears to lay down that a stepmother is under no 'legal duty' (it was admitted that there was a moral duty) to provide a midwife for an (unmarried) stepdaughter who is taken in labour. The neglect seems to have been quite deliberate and brutal and the girl died. With regard to servants, *R. v. Jane Charlotte Smith* (1865), Le. & Ca. 607 lays down that 'a mistress is not responsible for the death of her servant, caused by neglect to supply her with proper food and clothing, unless the servant is helpless and unable to look after herself, or is so under the dominion and control of the mistress as to be unable to withdraw herself therefrom.' This was a bad case of a mentally defective servant-girl who died after what certainly seems to have been very inhuman treatment, but there was just not enough evidence that her death was the direct result of the neglect, or that she was unable to withdraw from the service and look after herself.

² 'A man may imprison another to prevent apparent mischief which may ensue': *Vin. Abr.*, tit. *Trespass* (E. a), xx. 487. A good many of the cases cited seem to be simple cases of intervention to prevent a breach of the peace: concerning this, *scilicet*, there is no doubt.

In *Anon.*, Y.B. Hil. 22 Ed. 4, pl. 9 & 10, cited Br. *Abr.* tit. *Faux Imprisonment*, pl. 28, 'the plaintiff brought an action of false imprisonment against the defendant, the servant of one J. Fortescue, Esq., who had a commission from the King to seize the plaintiff on the ground that he was a Scot and an enemy to the King. The same plaintiff brought another action against the same defendant for the imprisonment of his wife. The defendant pleaded that he met the woman on the high road and told her that her husband had been imprisoned as a Scot, whereupon her behaviour was such that it seemed that she was mad like one that is a lunatic, and that the defendant, to avoid the mischief that might ensue, took her and imprisoned her in his house for the space of one hour. Fairfax J. said: "That is no plea, for you would have the jury try whether you thought, or whether it seemed to you, that she was mad as a lunatic, and that cannot be;

of no decision directly on the point. It is a favourite problem of the text-books whether the surgeon who performs an operation upon an unconscious patient has committed a trespass: there is no decision; but no lawyer seriously doubts that the act is justified if done under reasonable necessity and a bona fide desire to save life or to prevent suffering.¹ Some of the old cases show that a charitable motive was early recognized as a defence even in the extremely delicate matter of interfering between husband and wife: a man might, for example, intermeddle with feme when she was in jeopardy of her life from baron, and might carry her to a Justice of the Peace:² he might even intervene, it would seem, 'where the feme would kill herself'.³

Trespass to land may undoubtedly be justified if committed for the purpose of saving life or property. The question has most often arisen in connexion with entry to prevent or extinguish fire. As late as 1893,⁴ the Court of Queen's Bench was not prepared to say categorically that such a motive would excuse trespass, though actually on the older authorities, which in the particular circumstances it was not necessary to cite to the Court, there seems to be little doubt about the matter.⁵ In 1912, in

you ought to have alleged that she was in fact mad, and that she would have killed herself or done other mischief, as to set fire to a house . . . and therefore you shall understand that you should allege that she was mad in fact and that you were in dread that she would do you some mischief, wherefore you took her and imprisoned her in your house": per Phillimore J., *Cope v. Sharpe* (No. 2), [1911] 2 K.B. 837, 843. The doubt was as to the evidence: but it seems to have been assumed that if the woman was in fact dangerous, the imprisonment was justified.

¹ See Pollock, *Torts* (13th ed.), 175.

² Y.B. 12 H. 1. 37, cited Br. *Abr.* tit. *Trespass*, pl. 207, Vin. *Abr.* tit. *Trespass* (L. 3).

³ Y.B. 20 H. 7. 2, cited Br. *Abr. ibid.* pl. 440, Vin. *Abr. ibid.*

⁴ *Carter v. Thomas*, [1893] 1 Q.B. 673. Note the cautious dictum of Kennedy J. at pp. 678-9, and compare it with the judgement of the same learned judge, then Kennedy L.J., in *Cope v. Sharpe* (No. 2), *ubi sup.*

⁵ Y.B. 9 Ed. 4. 35b, cited Br. *Abr. ibid.* pl. 186, Vin. *Abr. ibid.* (I. a. 10); Y.B. 21 H. 7. 27, Br. *Abr. ibid.* pl. 213, Vin. *Abr. ibid.* (K. a. 3).

Cope v. Sharpe (No. 2), [1912] 1 K.B. 496, the Court of Appeal laid down the principle that the true justification for entry to combat fire is not the actual necessity as proved by the event, but what *seems*, in the emergency, to be necessary in the view of a reasonable man. It is true that in this case the defendant (through his servant) was protecting his own interests—viz. sporting rights—and not the interests of another; but there is no reason to think that the same principle would not be applied to intervention on behalf of a third person; and the true doctrine seems to have been expressed (in another connexion) by the Privy Council in the following words: ¹

‘When by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgement of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.’ ²

If altruism was among the few defences to trespass, a tort very difficult to justify in the old law, *a fortiori*, it might be set up in certain forms of action on the case. It is unnecessary to insist that the ‘social and moral duty’ pleaded in cases like *Stuart v. Bell*, [1891] 2 Q.B. 341 is purely altruistic, or that a genuine charitable motive may excuse what would otherwise be maintenance.

In contract, it cannot very often be in issue whether breach is justified by an urgent duty owed to a third person; but the question has come before the Courts in at least one important connexion. It was for long unsettled whether ‘the usual perils of the sea’, within the terms of a charter-party, would include a loss incurred through going to the rescue of a ship in distress. In 1880, ³ the Court of

¹ *Australasian Steam Navigation Co. v. Morse* (1872), L.R. 4 P.C. 222, 230. The point at issue, however, was purely one of commercial law.

² Cf. *Maleverer v. Spinke* (1537), Dyer 35 b; *Dewey v. White* (1827). Moo. & M. 56.

³ *Scaramanga v. Stamp* (1880), 5 C.P.D. 295.

Common Pleas held that a loss so incurred is covered by the terms of the contract, but only when the deviation is made in order to save *life* (not property). The point is interesting: under our severe doctrine of 'subsequent impossibility', the urgency or irresistibility of the interrupting cause is irrelevant: it could hardly be said that this risk was 'impliedly in the contemplation of the parties', for in the case under consideration one of them expressly repudiated it: and the judgement of the majority¹ rests solely upon the imperative moral duty of saving human life when in peril.²

(3) Solely in the interest of B, and believing himself to be under a duty to confer the benefit, A performs an unrequested service for B; has A any claim to be recompensed by the beneficiary? Doubtless the act ceases to be altruistic in the highest sense when a reward is sought for it; but supposing—since human nature is usually actuated by mixed motives—that the benefactor feels that in justice his good offices should, at the very least, not leave him in a worse position than before, is the duty which he has discharged one of a kind which the law will recognize as requiring recompense?

In maritime law, the answer is in no doubt. The law of salvage is very ancient and extremely widespread.³ The perils of the sea have always been so many and so imminent that the most elementary instincts of humanity have dictated the duty of rendering assistance to combat them; though it may well be that the earliest form of salvage was of a less idealistic kind—it was perhaps a reward and an encouragement to the salvor for his virtuous self-restraint in not committing depredations upon the shipwrecked and the helpless.⁴ Now the English law of salvage exhibits a curious jumble of altruistic and of self-

¹ Bramwell L.J., though agreeing in the result, based his reasoning on a narrower ground.

² See especially per Cockburn C.J. at p. 304.

³ See Ashburner, *The Rhodian Sea Law*, cclxxxviii ff.; *Abbott on Shipping*, part v, ch. iii; *The Gas Float Whitton* (No. 2), [1896] P. 42.

⁴ See Ashburner, *loc. cit.*

regarding principles; from what is called a 'psychological' point of view I do not know any branch of English law which is more interesting. One of its most firmly-established doctrines is that no claim for salvage lies *merely* for saving life; primarily the claim is for saving property harmless to its owner.¹ The altruistic moral duty of saving life is not considered to be one which deserves material reward; nor is the salvor recompensed for any courage or enterprise which he may have shown or any hardship which he may have endured, unless he has actually been successful in saving valuable property.² Indeed, the master of a vessel is under a statutory duty (which, however, does not exclude a claim for salvage) to go to the assistance of another vessel in distress, for the sake of saving life; but that duty is limited by the principle that he is not bound to go to the rescue if in so doing he would expose his own ship and its passengers and crew to an excessive risk. It is sometimes a matter of great nicety to decide between the extremity of others and the danger to the salvor's own vessel; and if he, believing his first duty to lie towards the imperilled ship, should be proved by the event to have been mistaken, he cannot recover for any damage which he himself may have suffered in doing what he honestly believed to be his legal as well as his moral duty.³ Again, it is clearly settled that the service performed, if it is to be the basis of a claim for salvage, must be definitely in the interest of another; and therefore nobody who himself benefits from salvage—such as an insurer or a passenger—has any claim for reward, save in exceptional circumstances which need not be described in detail.⁴

But all this complex law, so active afloat, disappears ashore. Why English law never developed any law of salvage for dry land and the things upon it, is by no means

¹ *The Renpor* (1883), 8 P.D. 115.

² *The Melanie v. The San Onofre*, [1925] A.C. at p. 262; *The Tarbert*, [1921] P. 372.

³ See *The Melanie v. The San Onofre*, *ubi sup.*

⁴ *The Neptune* (1824), 1 Hagg. Adm. 227, 236; *Gronan v. Stanier*, [1904] 1 K.B. 87; *Newman v. Walters* (1804), 3 Bos. & P. 612.

clear to me: I suspect the reason to be that while our law absorbed the foreign law merchant, with its doctrine of salvage, it never assimilated the foreign system which contained the doctrine of *negotiorum gestio*; though why it could not have developed a law of its own analogous to *negotiorum gestio* I do not profess to understand and, not having specially inquired into the historical reasons (if there be any, except mere chance), I venture no opinion.¹ Whatever the reason, it is certain that 'there is no case in any English Court in which the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo, or freight, which is peculiar to ships, or wreck of a ship or her cargo, or, by statute, the life of a person in danger, because the person has been on board the ship'.² There is no law of *negotiorum gestio* upon the soil of England—no claim for services rendered unless there was, at the time of rendering them, some promise, express or implied, on the part of the person who took the benefit, to pay for them. They are, in the curt words of Fry L.J.,³ 'a mere impertinence'. 'If work is done,' said Martin B.,⁴ 'and there is no bargain for payment, either express or to be implied from such circumstances as show an understanding on both sides that payment shall be made, an action cannot be maintained for remuneration merely because it may appear to be reasonable.' Are we to see in this dislike of unsought indebtedness a certain characteristic independence of the Anglo-Saxon temperament? Perhaps so; at all events, the

¹ The explanation of Bowen L.J. is sufficiently vague: 'The maritime law for the purposes of public policy, and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.' *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. at p. 248.

² Per Lord Esher M.R., *The Gas Float Whitton* (No. 2), [1896] P. 42, 53.

³ *Re Leslie* (1883), 23 Ch.D. at p. 561.

⁴ *Reeve v. R.* (1858), 1 F. & F. 280. Cf. note to *Lampleigh v. Braithwaite* in 1 Sm. L.C. (13th ed.), 156.

principle has been insisted upon rigidly. According to a well-known decision,¹ a man cannot even claim reward for services which he has performed under a promise to be given 'such remuneration as shall be deemed right'. If certain old decisions still have authority, it would seem that the finder and preserver of a dog has no claim to recompense from its owner, nor even a lien for the animal's keep;² and what applies to a dog appears to apply generally to all creatures and all articles found and kept for the benefit of their owners.³ At one period in the nineteenth century an attempt was being made to establish a principle that one who paid the premiums on an insurance policy on behalf of the insured, in order to preserve the property, was entitled to reimbursement and had a right of priority over incumbrancers of the policy; but a decisive quietus was given to the doctrine by the Court of Appeal in *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234.⁴

If it amuses us to speculate as to the psychological bases of the law, we may find two possible, and antithetic, explanations of the English rejection of *negotiorum gestio*. The idealist may see in it an assertion of the lofty principle that the virtuous act should be its own reward: and, as we have seen, this notion does seem to be implicit in the maritime rule that salvage cannot be claimed for saving human life. The cynic, on the other hand, may see in our rule a suggestion that if a man chooses to give rather than to sell his services, the more fool he. Some support might be found for the latter view in the implication which seems to lie behind the Common Law doctrine of consideration, and perhaps also behind Equity's distrust of the 'mere volunteer', viz. that a sensible man does not give something for nothing.

¹ *Taylor v. Brewer* (1813), 1 M. & S. 290.

² *Binstead v. Buck* (1776), 2 W. Bl. 1117.

³ *Nicholson v. Chapman* (1793), 2 H.Bl. 254.

⁴ The authorities are exhaustively examined by Cotton L.J. Hard cases may sometimes undoubtedly result from the principles laid down in this case and by Fry L.J. in *Re Leslie, ubi sup.*: see *Re Winchelsea* (1888), 39 Ch.D. 168.

But it is probably unsafe to read too many speculative refinements into a doctrine which may have a much simpler historical explanation. What is clear is that the harsh repudiation of the very reasonable principle of *negotiorum gestio* cannot operate without considerable exceptions. There is, for example, one somewhat vague form of quasi-contract which is difficult to reconcile with it: I mean the action for 'money paid to the use of the defendant'. Though this action undoubtedly exists, it is not easy to lay down with precision in what circumstances it will lie. It is usually stated that a plaintiff may recover in this form of action when he 'has been compelled, under threat or reasonable apprehension of legal proceedings or legal restraint of goods, to pay a sum of money or do any other act which another person is primarily liable to pay or perform':¹ but sometimes the liability is placed upon very much broader grounds of natural justice than reimbursement of money paid under actual compulsion.² In my humble opinion, the basis of this action has not yet been thoroughly and satisfactorily explored, historically or analytically, and it would form a valuable subject for some

¹ Jenks, *Digest of English Civil Law*, para. 709, citing *Duncan v. Benson* (1847), 3 Exch. 644; *Roberts v. Groove* (1872), L.R. 7 C.P. at p. 637; *Edmunds v. Wallingford* (1885), 14 Q.B.D. at pp. 814-15; *Tubbs v. Wynne*, [1897] 1 Q.B. 74; to which add *Exall v. Partridge* (1799), 8 T.R. 308.

² e.g. by Brett M.R. in *Leigh v. Dickeson* (1884), 15 Q.B.D. at p. 64: 'Money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable.' Cf. *Roberts v. Champion* (1826), 5 L.J.O.S. (K.B.) 44; and contrast *Aktieselskabet Dampskibs Steinstad v. Pearson* (1927), 137 L.T. 533; and see *Leake on Contracts* (7th ed.), 44: 'A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without any actual agreement to that effect' (citing *Maxwell v. Jameson* (1818), 2 B. & Ald. 51; *Adams v. Dansey* (1830), 8 L.J.O.S. (C.P.) 165; and *Lewis v. Campbell* (1842), 19 L.J. (C.P.) 130, per Maule J.).

enterprising student's investigation, for it is of much interest both theoretically and practically.

Nor, again, is it easy to define the circumstances in which A will have an equitable lien for money expended on the goods of another, and here, too, historical analysis would be valuable.¹

The law of trusts recognizes a limited kind of *negotiorum gestio* in the familiar principle that a trustee who has properly and reasonably paid moneys out of pocket for the preservation of the trust property is entitled to be reimbursed out of the estate² or by the *cestui que trust* if *sui juris*,³ and to retain a lien on the trust property for such reimbursement.⁴ This is the most elementary justice in the case of a person who undertakes onerous duties and liabilities on behalf of another, frequently without remuneration of any kind. The same principle necessarily applies to the executor,⁵ and there is some authority for holding that even an executor *de son tort* is, in similar circumstances, entitled to some measure of protection: for although he cannot claim for moneys paid in the course of his wrongful administration, it seems that he may plead such payments in mitigation of damages in an action of trover or trespass brought by the rightful executor or administrator.⁶

Another type of *quasi-negotiorum gestio* is to be found in maritime law, in the principle of general average, according to which one of several co-adventurers who has made a sacrifice of his own particular interest in a manner which accrues to the interest of all is entitled to share the

¹ Contrast, e.g., *Jones v. Cliff* (1833), 5 C. & P. 560, *Unity Joint Stock Mutual Banking Association v. King* (1858), 25 Beav. 72, and *Millard v. Harvey* (1864), 10 Jur. N.S. 1167.

² Trustee Act, 1925, s. 30 (2).

³ *Balsh v. Hyham* (1728), 2 P. Wms. 453; *Hardoon v. Belilios*, [1901] A.C. 118.

⁴ *Re Leslie*, *ubi sup.*; *In re Jewell's Settlement*, [1919] 2 Ch. 161.

⁵ Trustee Act, 1925, s. 30 (2).

⁶ 2 Bl. Comm. 508; *Williams on Executors* (11th ed.) 187, and authorities there cited.

contribution with the others who have benefited. This, like salvage, is a very ancient institution of the sea;¹ but it differs from true *negotiorum gestio* in that the claimant recovers for a sacrifice made in an interest which is not entirely another's but is partly his own.

(4) The last aspect of altruistic duty in law is perhaps the most interesting, because here, I think, we can see the clearest evidence of the gradual development—as yet incomplete—of a new legal conception. The cases to which I am about to refer could not, I believe, conceivably have been decided a hundred years ago in the sense in which they have been decided within recent times. It is not too much to say that throughout the latter half of the nineteenth century, and throughout the twentieth century so far as it has gone, there is to be observed a growing recognition of a moral principle commended by Cockburn C.J. in a case which I have already mentioned²—a case *primae impressionis* which laid down that deviation in the course of a voyage in order to save life is an excuse for apparent breach of the terms of a charter-party: 'The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity. . . . It is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences.'

When a man obeys this 'impulsive desire to save human life', and is injured in so doing, is his act to be regarded, in a legal point of view, as one of supererogation for which his only reward is the *mens sibi conscia recti*, or will the law impute liability for his injury to the person who in the first instance exposed human life to danger? It is clear that the rescuer has no claim against the person whom he has saved, or attempted to save, from harm; but there is a growing body of case-law in Anglo-American jurisprudence which gives approval and encouragement to the performance of this high altruistic duty.

¹ Ashburner, *op. cit.*, ccli; *Abbot on Shipping*, part iii, ch. viii.

² *Scaramanga v. Stamp* (1880), 5 C.P.D. 295, 304.

One Scots decision of 1886¹ left this question open as a matter of legal principle, though the result of the case, on the findings of fact of the jury, was that a young woman who was killed while endeavouring to drag her companion out of danger from a negligently-driven train was held not guilty of contributory negligence. In 1897, in *Wilkinson v. Kinneil*, 24 R. 1001 (Court of Sess.), the issue was raised nakedly in the Court of Session, and it was held by a majority of four judges to three that a boy who was injured in attempting to save a fellow-workman from a runaway wagon was not disentitled by contributory negligence from claiming damages from his employers.²

A consistent group of American decisions in different States is to the same effect. In *Eckert v. Long Island Railroad*, 43 N.Y. 502, damages were recovered by the executor of a person who was killed in the attempt to save a child from a negligently-driven train. The facts of *Ridley v. Mobile & C. Railroad Co.*, 86 S.W. Rep., were very similar, and the decision the same. So, too, in *Pennsylvania Railroad Co. v. Roney*, 89 Ind. 453, where an engine-driver, in a collision, instead of jumping from his train and thereby probably saving himself, stood at his post in order to try to stop the train and save the passengers, and was killed.³ Similarly it has been held that a defendant

¹ *Woods v. Caledonian Ry. Co.* (1886), 23 Sc. L.R. 798.

² These cases are discussed in *Beven on Negligence* (4th ed.), i. 176 ff. Beven's own view (with which his latest editors disagree) is summed up in these words: "To entitle one to relief from the consequences of another's negligence, it is by no means necessary that the injured party should have been at the time of receiving the injury in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act; and an attempt to save life endangered by the negligence of another, whether obligatory as a duty or not is certainly in itself a thing lawful; while the wrongdoer is liable for the results of his negligence. . . . The defendants have not done their duty; else there had been no emergency; how can they be allowed to escape liability by alleging that one in the performance of the "plainest and highest duty" had been injured in his instinctive effort to neutralise their default?"

³ Both the last two cases are cited by Street, *Foundations of Legal*

who negligently leaves an opening in a bridge, so that a child falls into the stream, is liable in damages to the parent who plunges to the child's rescue:¹ and, on the same principle as the Scots case just mentioned, that the widow of a workman who has been killed while attempting to rescue a fellow-workman from a source of danger (a 'cave-in') negligently caused, is entitled to damages.² Perhaps the most striking of this line of cases is *Wagner v. International Railroad Co.*, 232 N.Y. 176.³ The plaintiff and his cousin were passengers in the defendant's railway. They were standing up, the car being greatly overcrowded. The doors were negligently left open, and at a point where the train oscillated, the plaintiff's cousin was thrown out upon a bridge. An alarm was given, but the train did not stop until it had crossed the bridge. The plaintiff went back in the darkness over the bridge looking for the body of his cousin, and walking on the trestles. He fell and was injured. He was held entitled to recover damages. Cardozo C.J. said:

'Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to the rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.'

In England there is only one case similar to these American decisions, and it is comparatively recent. In *Liability*, i. 133, who also cites: *Donahoe v. Wabash &c. Railroad Co.*, 83 Mo. 560; *Spooner v. Delaware Railroad Co.*, 115 N.Y. 34; *Pennsylvania &c. Railroad Co. v. Langendorf*, 48 Ohio St. 316; *Cottrill v. Chicago &c. Railroad Co.*, 47 Wis. 634. See also *Alabama Power Co. v. Conine*, 104 So. 535 and *Seaboard Air Line Co. v. Johnson*, 115 So. 168. In some jurisdictions the principle has even been extended to risk incurred in saving the property of another from harm: see, e.g., *Atlantic Coast Line R. Co. v. Wildman*, 116 S.E. 858.

¹ *Gibney v. State of New York*, 137 N.Y. 1.

² *Matters of Waters v. Taylor Co.*, 218 N.Y. 248.

³ I am indebted for this reference to Professor A. L. Goodhart.

Brandon v. Osborne Garrett, [1924] 1 K.B. 548 the plaintiff's husband, while in a shop as a customer, was injured by a piece of glass which was allowed to fall by the negligence of contractors who were repairing the roof. The plaintiff was not touched by the glass, but believing, as she had every reason to do, that her husband was in serious danger, she clutched him and tried to pull him out of harm's way. In so doing, she strained her leg and caused the recurrence of an old thrombosis. Swift J. had no difficulty in adopting the reasoning of some of the American cases to which I have adverted or in basing himself on Cockburn C.J.'s principle.

'I do not say', he observed, 'that there is a legal duty to risk one's own life to save that of a stranger; indeed, I should unhesitatingly say there was not, but there may be a nearer approach to such a duty to save the life of one's child or wife or husband. In any event there may be a moral obligation which would so act upon the mind of any ordinary reasonable man that he would instinctively rush to the assistance of one in immediate peril through the negligent act of a third party. If he were injured by that negligent act of the third party and sued him, I think the real question would be for the jury to decide, and that question would be—was the plaintiff in all the circumstances guilty of contributory negligence?'

¹

In this growing doctrine of the Common Law, then, we may see a recognition of the fact—which, as I have said, a hundred years ago would probably not have been admitted as a circumstance which the law could safely assume—that, at least where human life is at stake, the impulse to purely altruistic conduct is part of the morality of the average man. This kind of conduct is not likely to be actually enforced by any system of law in an imperfect world, since it involves the extreme self-sacrifice than which, we are taught, no man hath greater love; but it seems not at all improbable that some day the law may imperatively require of human nature at least that minimum of altruism which Bentham, and most sensible persons with him, considered not in excess of the plain man's plain duty.

¹ This was the view adopted in *Woods v. Caledonian Ry. Co.*, *ubi sup.*

THE NATURE OF A CRIME¹

I. INTERRELATION OF DIFFERENT KINDS OF LEGAL WRONGS

NOTHING in jurisprudence has led to more inconclusive discussion than the true ground of distinction between tort and crime. The breach of legal duty is wrongful, whatever the duty may be. It is wrongful to break a contract: but there are only two or three cases in English law in which breach of contract is a crime. They are all modern. They occur in connexion with the contract of service and industrial disputes, and they contemplate circumstances in which the wilful and malicious breach of a contract of service would involve serious danger to life or property.² So far as I can discover there are no reported convictions for any of these statutory offences.

Tort is, by its very name, wrongful and is nearly always criminal as well; but not invariably. It is wrongful to subject one's neighbour to a nuisance; but this is not criminal, unless the general public is affected. Slander is wrongful, but it is not indictable, unless it tends to an immediate breach of the peace, or is blasphemous or seditious. Why is it actionable and not punishable? And why are so many wrongs both actionable *and* punishable?

The answer is not easy, either in theory or practice. It is not only that in juristic doctrine endless technical distinctions may be drawn without ever arriving at anything which satisfies the mind as a real *difference*; but even in their practical legal effects it is not always easy to disentangle these various kinds of wrongs one from another. Probably the most nebulous part of our law of torts is that debatable land where contract merges in tort and tort in

¹ *Journal of the Society of Comparative Legislation*, Feb. 1931.

² Archbold, *Criminal Pleading, Evidence and Practice* (27th ed.), 1286. See Conspiracy and Protection of Property Act, 1875, s. 5 and s. 7 (supplying gas and water; see Halsbury, *L. of E.* ix. § 1143), and Trade Disputes Act, 1927, s. 6 (4) (employees of local public authorities).

contract; it is sometimes almost impossible to distinguish between the 'common law' involuntary duty which is imposed by the general law of torts and the localized, voluntary duty which is undertaken by a contract. It requires, for example, a considerable effort of ingenuity to distinguish satisfactorily between the grounds of the decision in two cases like *Jennings v. Rundall* (1799), 8 T.R. 335^m and *Burnard v. Haggis* (1863), 14 C.B.N.S. 45.

The affinity between tort and crime is not in the least surprising when we remember how late in the history of law there emerged any clear conception of a difference between them. That is a commonplace of legal history: it has often been described, and never more graphically than by Maine in the last chapter of *Ancient Law*. All readers of that remarkable book will remember how slowly and how clumsily the Romans, for all their legal genius, developed a body of law which we should recognize nowadays as distinctively 'criminal'. It seems that the primitive elements of criminal law are slower to disappear than the primitive elements of any other branch of law—as we are reminded when we recall that such institutions as *peine forte et dure* did not disappear from English society until the eighteenth century, nor the appeal of felony and the deodand until the nineteenth century. The slowness of the growth of criminal law is doubtless due to the fact that it is largely and inevitably concerned with the 'old Adam', both in the criminal himself and in the avenger of crime; and Adam changes little in the course of the ages. In the highly civilized days of Justinian we find, still vigorously persisting in one of the commonest offences—theft—what seems to us to be an extraordinary medley of private restitution and public sanction: and in that one 'delict' (which we nowadays consider emphatically a crime), with its distinctions between different kinds of wrongful contravention and asportation: its distinction, too, between the surreptitious theft, which roused no angry passions until after the event, and the manifest theft which invited immediate violent vengeance; and in the substitution of

predetermined penalties in place of the savage punishments of the older law: in this one delict we may see an epitome of the whole development of criminal law in maturing societies. In the broadest terms, with the exception of those crimes against the security of the State which were always the concern of the people as a whole—high treason, *maiestas* and *perduellio*—we may say that the history of Roman criminal law is the very gradual and very imperfect emergence of public discipline out of private retribution, which latter in its turn was probably preceded by corporate retribution in the shape of the clan feud, at all events when blood was shed.

II. HISTORICAL RELATIONSHIP BETWEEN CRIME AND TORT IN ENGLISH LAW

The same, indeed, may be said of criminal law the world over; and yet it is a curious circumstance that at one stage in our own legal history exactly the reverse process seems to have been taking place.¹ Everybody knows that in Anglo-Saxon times the old blood-feud, which probably had become an intolerable and an exhausting nuisance, was succeeded by a system of *wer* and *bót*, very characteristic of Germanic peoples, as we know from Tacitus. The wrongdoer could buy off his wrong by paying the *wer*, the value of a slain man's status, or the *bót*, the compensation, elaborately assessed in legal codes, for injury done to person or property. The system still flourishes in many parts of the world; it is, for example, in full vigour in Abyssinia (a Christian country). But this was by no means the whole of penal law. The malefactor could not, like the celebrated Roman wag who went about striking passers-by with a rope's end, or like the intruder of modern times who tenders a shilling for his technical trespass, indulge whatever criminal whims he chose if he was prepared to pay for them. To begin with, there were

¹ Pollock & Maitland, *History of English Law* (hereinafter referred to as P. & M.), ii. 448.

certain grievous offences for which no *bót* could atone. They struck too deep at the foundations of society to be reduced to terms of cash. Again, there was a fearful penalty for those—and they must have been numerous—who could not find *wer* or *bót*: they were outlawed beyond the pale, and became not only the rightless outcasts, but the common enemies of society. And over and above this, there was the punitive power of the King. *Bót* was not all that the offender might have to pay: there was *wite* also for the King or for some other public guardian of the peace: and there is evidence that the *wite* was often so heavy that the ordinary wrongdoer had little hope of paying it, and was obliged to suffer imprisonment, or worse, for his default.¹ 'Vengeance is mine' was certainly a watchword of the Norman and Angevin kings, and it was a very swift and terrible vengeance, visiting upon the criminal not only loss of life or liberty, but every form of torment which the body could endure. If we may add another Scriptural quotation, the wages of sin was death, or mutilation, or both.

Now this power of punishment, in life and limb or in money, over and above private satisfaction, was jealously preserved and steadily extended. 'Perhaps', says Maitland,² 'there never was a time in this country when the community did not inflict punishment upon, as distinguished from declaring outlawry against, certain criminals.' Maitland's picture of English criminal law in the twelfth century is extraordinarily different from that of the criminal law before the Conquest. The King's Peace becomes 'an all-embracing atmosphere'. Outlawry—always a desperate expedient which really confesses the inability of society to cope with its criminals—is no longer an *ex post facto* punishment, but a process for compelling attendance. It is to the King, or to the King's officer, the sheriff, or to the lord in the court of leet, or to the hundred in the local court, that the wrongdoer is answerable—answerable in many ways, in life and limb, in liberty, and in money,

¹ P. & M. ii. 460.

² *Ibid.* 451.

whether it be heavy fine or trifling amercement. More—each locality becomes responsible for the repression of its own malefactors; His Majesty's Justices in Eyre will make close inquiry into misdemeanours committed within the district and will need to be satisfied amply that evil-doing has been adequately atoned—of course in cash, for it is in the financial aspect of crime that the King is particularly interested. It is important to remind ourselves of this all-pervading, direct relationship, in medieval times, between the individual liegeman and public authority. Setting aside that large and complicated body of rules which govern the tenure of real property, the general law of the land which governs the individual in his daily doings is what we should nowadays call criminal law. The ordinary action, for damages *inter partes*: the conception, in short, that for injury done a specific plaintiff has a claim for compensation against a specific defendant: this is practically unknown. It is otherwise, however, when a man asks for the due restitution of a thing which is his, or when he asks to be put back in possession of the tenement of which he has been wrongfully deforced. 'When we look back to the first age of royal justice we see it doing little else than punishing crime and giving specific relief.'¹

The King's peace is still 'an all-embracing atmosphere'. It is not too much to say that the whole group of rights and wrongs which make up torts, contracts, and crimes have their origin, I will not say in 'criminal law', for that is to anticipate events, but in a system of rules which nowadays we should consider essentially 'criminal'. The starting-point of them all is that force is the monopoly of the State. Any unauthorized private exercise of force, to persons, to things, or to land, is punishable wrong. This is trespass, which, as we know from our Bible, is only another name for wrongdoing or sin. Out of this master-principle, when it becomes inadequate by itself to cover multiplying legal relationships, spring those 'actions on the case in the nature of trespass' which are to form so large a part of the

¹ P. & M. ii. 523.

law of torts. They are very far indeed, in actual effect, from wrongdoing *vi et armis*; none the less, trespass is their parent. One of these actions upon the case concerns the wrong of doing ill, or altogether failing to do, what one has undertaken to do; it becomes *assumpsit* and supplies an action upon a promise which has not been fortified with the sacrament of sealing and delivering. Disturbance of the King's Peace—wrong not to the rights of an individual but to the disciplinary sovereign of society itself—is the *primum mobile* of all these large and vital departments of the Common Law.

It would seem, then, that in the incalculable actions and reactions of history, crime sometimes springs out of tort and tort sometimes springs out of crime. Whichever of these two processes prevails, the connexion between the two forms of wrong is perpetual and inseverable.

III. FORMAL DISTINCTIONS BETWEEN CRIME AND TORT

But there is a difference between them, and we must try to discover it. It is needless to consider all the distinctions which have been drawn, because a great many of them seem to be concerned with incidentals, not with essentials at all. For example, Professor Kenny, in the first chapter of his *Outlines of Criminal Law*, experiments with one suggested distinction after another, but is everywhere baulked by the existence of that curious kind of procedure known as the 'penal action'—an action which has for its object pecuniary punishment, payable, however, not to the State, but to the prosecutor or informer. Again and again Professor Kenny finds it impossible to fit the penal action into a scheme which otherwise seems satisfactory. But is it not an excess of exactitude to allow any juristic distinction whatever to depend upon the existence of a freak like the penal action? It is a hybrid and an anomaly, and all that need be said about it is that it is a criminal form of action in which the State, either to

stimulate vigilance or to relieve itself of certain police duties, makes an exception to the general mode of payment of penalties.

1. *Procedure*. Let me take another example of the kind of tantalizing reasoning which has luxuriated in this field. It is often said that the only real distinction between tort and crime is one of procedure. The 'manager' of the action in the one case is a private individual, in the other case it is the State. To this it is objected that there are many occasions in criminal law when the 'manager' is a private prosecutor: and indeed any person whatever may prosecute an indictable offence. Now, for reasons which will be stated presently, it is not here conceded that procedure forms the sole or even the principal difference between tort and crime: but it is certainly a difference, and a genuine one—formal, however, and not material: and to dismiss it on account of the private prosecutor is highly unconvincing. For in reality the private prosecutor is nothing better than an informant or complainant. The Crown may permit an individual to set the machinery of criminal justice in motion, but it remains absolute master of that machinery, and the prosecutor has no right to demand the punishment of the offender. The Crown may always, by means of the *nolle prosequi*, arrest the machinery—its own machinery—there and then.¹ It is quite otherwise in civil actions. There is no power in the land, short of Parliament, which can prevent a plaintiff from suing for the damages to which he has a reasonable claim. I assume, of course, that the claim is not frivolous; if it be quite empty, then, whether it be vexatious action or vexatious indictment, it goes without saying that it will never come to trial.

¹ In addition, there are a considerable number of offences as to which no private person may prefer an indictment unless (1) he is bound by recognizance to prosecute or give evidence, or (2) the accused is in custody or is bound over, or (3) the indictment is authorized by a judge, a law officer of the Crown, or certain other public functionaries: Vexatious Indictments Act, 1859, s. 1.

It is the fact last mentioned, viz. that the Crown or State always remains master of criminal proceedings, which in Austin's view¹ constitutes the only real difference between tort and crime. He insists that there is no distinction in the *quality* or *tendency* of the two things. Wrong is wrong: a tort may do far more actual damage than a crime, and its tendency may be just as dangerous as that of a crime: and the traditional Roman distinction between the 'public' and the 'private' offence is (he holds) unreal, because ultimately all legal wrongs, however limited in their actual effects, are detrimental to the public interest. But he sees a substantial difference in the fact that in the one case the person who is graphically called in Scots law the 'pursuer' is a private individual, in the other case it is the State. 'Where the wrong is a civil injury,' Austin sums up,² 'the sanction is enforced at the discretion of the party whose right has been violated. Where the wrong is a crime, the sanction is enforced at the discretion of the sovereign.' If I have successfully followed Professor Kenny into, through, and out of the maze into which he leads us, I understand this to be also the view of that learned and entertaining author, who adds that the Crown has not only the monopoly of 'pursuing', but of remitting the pursuit and pardoning the pursued.

2. *Retribution versus restitution.* Austin discusses another distinction which is commonly adopted. The object of every civil action is the payment of damages to an individual. There is, no doubt, an added penal sanction: if the losing party contumaciously refuses to pay what he is condemned to pay, he may be imprisoned or otherwise constrained: but this is merely supplementary machinery to effect the principal purpose, viz. the *restitutio in integrum* of a wronged individual. The object of criminal prosecution, on the other hand, is to punish. If the penalty is pecuniary, nobody gains except the public exchequer; if it is not pecuniary, nobody gains at all—indeed, the community, which unhappily has to maintain prisons, is a loser.

¹ Lect. XXVII.

² *Loc. cit.* 518 (Campbell's ed.).

Having mentioned this apparent distinction between *restitution* and *deterrence*, Austin expresses his dissatisfaction with it, on two grounds. First, because the 'remote end' of enforcing *all* liability, whether civil or criminal, is the prevention of offences generally. This is true enough, but it only amounts to saying that one of the chief purposes of law is to preserve order in society; we are not in this connexion concerned with the 'remote end' of all law whatsoever, but with the very manifest and, I believe, significant difference between the *immediate* ends in view in dealing with these two different kinds of wrong. 'Second, Austin observes that in certain kinds of criminal prosecutions, it is an individual and not the State who is enriched by the penalty imposed. He is referring to the 'penal actions', which are such a source of anxiety to Professor Kenny. They were more common in Austin's day than they are at present, but they were always of such an obviously exceptional nature that they had nothing relevant to say to the analysis of the nature of crime.

3. *Punishment the only ground of distinction by English case-law.* In several important connexions, our Courts have had to wrestle with this difficult question of the distinction between civil and criminal liability. Before the Criminal Evidence Act, 1898, a prisoner could not give evidence on his own behalf, and it was sometimes of much moment to decide the exact nature of the cause before the Court, for if it were civil, the defendant could give evidence in support of his own case,¹ and if it were criminal, he could not.² Little enlightenment upon the true ground of the distinction is to be derived from the case-law on this topic, so far as I have examined it. In another association, which has proved to be very troublesome, the question has been constantly before the Courts since 1873. At that date, criminal appeals, such as they were, were the province of the Court of Crown Cases Reserved, and it was desired

¹ After the Evidence Act, 1851.

² See, e.g., *Parker v. Green* (1862), 2 B. & S. 299; *R. v. Sullivan* (1874), 8 I.R.C.L. 404.

to maintain that system when the Courts were reorganized and the jurisdiction of appeals was reformed by the Judicature Act, 1873. Accordingly, it was provided by s. 47 (now re-enacted by the Judicature Act, 1925, s. 31 (1) (a)) that no appeal should lie to the ordinary Courts of Appeal of the Supreme Court in 'any criminal cause or matter'. In case after case the Court of Appeal and the House of Lords have had to ask themselves exactly what the Act means by that expression. Anybody who examines the large number of these decisions will regretfully come to the conclusion that the amount of illumination is in inverse ratio to the effort of inquiry.¹ And this, though disappointing, is not surprising. Well knowing the idiosyncrasies, often in the nature of historical survivals, of our unkempt criminal law, our judges have hesitated to essay anything like a watertight definition of crime. Nobody, indeed, will ever be able to attempt it except a codifier who has a charter to fashion the whole existing system into something resembling shape and consistency. It is one of the most depressing commentaries on democratic parliamentary government that while this imperative social measure has been advocated for centuries by one competent critic after another, political exigencies have apparently never permitted time for it. There is time, apparently, to add further complexity to the feudal land-law by

¹ For the benefit of any who may desire to investigate the matter further, and since it has been found necessary to collect, not without difficulty, the decisions from different sources, I append a list of the principal cases in chronological order: *R. v. Master* (1868), L.R. 4 Q.B. 285; *Mellor v. Denham* (1879), 5 Q.B.D. 467; *R. v. Whitchurch* (1880), 7 Q.B.D. 534; *Ex p. Woodhall* (1888), 20 Q.B.D. 832; *R. v. Barnardo* (1889), 23 Q.B.D. 305; *Cox v. Hakes* (1890), 15 App. Cas. 506; *Ex p. Schofield*, [1891] 2 Q.B. 428; *Ex p. Pulbrook*, [1892] 1 Q.B. 86; *Seaman v. Burley*, [1896] 2 Q.B. 344; *Derby Corporation v. Derbyshire C.C.*, [1897] A.C. 550; *Robson v. Biggar*, [1908] 1 K.B. 672; *R. v. Governor of Brixton Prison, Ex p. Savarkar*, [1910] 2 K.B. 1056; *R. v. Wiltshire Justices, Ex p. Jay*, [1912] 1 K.B. 566; *Scott v. Scott*, [1913] A.C. 417; *R. v. Garrett*, [1917] 2 K.B. 99; *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570; *R. v. Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] A.C. 603.

enormously laborious legislation, but there is no time to set the house of correction in order—throughout, and not merely in this and that nook and cranny. Whatever merits our system of precedent-law may possess—and they are great—the huge case-law which has grown up round Common Law and statutory felonies and misdemeanours has led to at least as much darkening of counsel as lightening of darkness.

The only sure principle which seems to emerge from these cases concerning s. 47 of the Judicature Act is that the test of criminality is *punishment*. The most authoritative decision in the group is *In re Clifford and O'Sullivan*, [1921] 2 A.C. 570, in which case the Lord Chancellor (Lord Cave) attempted to establish a convenient working test. He found it¹ in two considerations: the matter in question 'must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence'. It is unnecessary to observe that the first branch of this dictum leaves us exactly where we were, for to describe a crime as 'an offence against the public law' explains nothing whatever. But the test of punishment is at least tangible and recognizable.² In conformity with it, the term 'criminal' has been applied, within the meaning of the Judicature Act, to matters as diverse as the following: disobedience to by-laws of a school constituted under the Elementary Education Act, 1874,³ disobedience to an order made by justices under the Public Health Act,

¹ At p. 580.

² It merely adds unnecessary confusion to enter into refinements as to what amounts and what does not amount to punishment. It is pointed out by Lord Herschell in *Derby Corporation v. Derbyshire G.C.*, [1897] A.C. 550, that in one sense, all legal proceedings *may* end in a penalty. But there is a clear difference between a penalty for not-complying with a judgement and a punishment directly imposed upon a convicted person.

³ *Mellor v. Denham* (1879), 5 Q.B.D. 467.

1875, to fill up an ash-pit,¹ disobedience to a magistrate's order to abate a nuisance.² *R. v. Fletcher* (1876), 2 Q.B.D. 43 was an interesting case on the border-line between civil and criminal proceedings. The matter in question was trespassing by day in pursuit of game, and the justices, upon summary conviction, had imposed on the defendant a penalty of one shilling and costs. It was contended that the action was in substance only a form of procedure for the protection of private property, the defendant having (it was claimed) acted under a bona fide claim of right; but the Court of Appeal held it to be a criminal cause or matter. It was early laid down,³ and has constantly been reasserted, that the statutory phrase 'criminal cause or matter', is to be given a wide interpretation; but the test of punishment seems to be the only one which has been consistently and satisfactorily applied. An attempt has been made, for example, to reduce the question to one of procedure, and it has been held by several judges that the only matter to be considered is whether the appeal then before the Court arose in the first instance from civil or criminal proceedings.⁴ But this test is manifestly unsatisfactory, for it entirely begs the question, what are criminal and what are civil proceedings? which, in its turn, must depend upon the initial question, what is a crime and what is a civil cause of action? Its imperfection is illustrated by the fact that in the attempt to apply it, no difference has been recognized between the substantive question of what constitutes a criminal cause or matter and the adjective question whether a particular Court has *jurisdiction* to entertain a criminal cause or matter—two perfectly distinct inquiries.⁵ It is not easy to see why an application

¹ *R. v. Whitchurch* (1880), 7 Q.B.D. 534.

² *Ex p. Schofield*, [1891] 2 Q.B. 428.

³ *Ex p. Woodhall* (1888), 20 Q.B.D. 832.

⁴ See, e.g., *per* Cotton L.J. in *R. v. Barnardo* (1889), 23 Q.B.D. 305 and *per* Kay J. in *Seaman v. Burley*, [1896] 2 Q.B. 344.

⁵ See *per* Banks L.J. in *R. v. Garrett*, [1917] 2 K.B. 99 and *per* Lord Sumner in *In re Clifford and O'Sullivan*, *ubi sup.* A number of decisions, however, have turned purely on points of procedure. Thus in *Ex p. Pulbrook*,

for a writ of prohibition to restrain an inferior Court from entertaining a criminal charge which it has no jurisdiction to entertain should be an *appeal from* a criminal cause or matter.

IV. MATERIAL DISTINCTION BETWEEN CRIME AND TORT: REPRESSION OF INJURIOUS ACTS (A PRINCIPLE OF SOCIAL SECURITY) AND PRIVATE *RESTITUTIO IN INTEGRUM* (A PRINCIPLE OF REMEDIAL JUSTICE)

We may safely take it, then, that in English case-law the distinguishing mark, *par excellence*, of a crime is that it involves liability to punishment. But that is not more than a distinguishing mark: it does not explain the thing itself. Any description of crime which centres either in procedure or in the fact of punishment amounts only to a formal, not to a material definition. It is not enough to know that crime is punishable wrong; the problem is, why is it punishable? Why, in other words, does the State consider it necessary, in the case of some wrongs but not of others, to take direct disciplinary action?

I believe the true answer is the one which is rejected by Austin and Dr. Kenny. Crime is crime because it consists in wrongdoing which directly and in a serious degree threatens the security or well-being of society, and because

[1892] 1 Q.B. 86, the order of a judge in Chambers authorizing (as is required by the Law of Libel Amendment Act, 1888) a prosecution for criminal libel against the editor of a newspaper was held to be a criminal cause or matter; in *R. v. Wiltshire Justices, Ex p. Jay*, [1912] 1 K.B. 566, Jay, having given notice of appeal against a summary conviction for wilful damage to property, did not prosecute the appeal and was ordered by Quarter Sessions to pay costs, and this was held to be a criminal cause or matter; and in *R. v. Governor of Brixton Prison, Ex p. Savarkar*, [1910] 2 K.B. 1056, the refusal of a Divisional Court to issue a writ of habeas corpus in the case of a prisoner committed under the Fugitive Offenders Act, 1881, was held to be unappealable. To what extent the criminal nature of a charge affects the right to appeal in respect of habeas corpus is discussed in *R. v. Barnardo, ubi sup.*, and in the great case of *R. v. Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] A.C. 603 and [1923] 2 K.B. 361.

it is not safe to leave it redressable only by compensation of the party injured. Wronged individuals are sometimes timid, sometimes supine, sometimes lazy, sometimes unable for one cause or another to pursue their remedy; the suppression of injurious wrongdoing must not be left to the mercy of such accidents, but must be controlled by some public authority more powerful and less erratic than the private plaintiff. Besides, there are a great many kinds of actions which do not injure any specific person at all, or at all events injure all persons equally, and for these there are no private remedies, for the excellent reason that they are not private wrongs. If the State does not take measures to suppress them, nobody else will or can.

This is not only the simple common sense of the matter, but it is, in my submission, the accepted view of English law. Turning to the Pandects of English law, by which I mean that extraordinary work, Halsbury's *Laws of England*,¹ I find a crime thus defined:

'A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has a remedy in a civil action, it is as an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State.'

And a note adds, very pertinently, that this fundamental element of crime was very well evidenced by the fact that the old form of indictment always concluded with the solemn denunciation that the offence was an injury to the peace and the crown and the dignity of our Lord the King. One cannot help casting a longing, lingering look on that old ritual, for it was a reminder of that interesting historical fact of which mention has already been made—viz. that much of our law of wrongs and remedies drew its nourishment from 'the all-embracing atmosphere' of the King's Peace. And indeed the whole history not only of English but of all civilized criminal law teaches us the

¹ ix. § 499.

same lesson; wrongs become crimes only when the State, outgrowing infancy, is strong enough and alert enough and conscious enough of its obligations to its members to take measures of punishment against crime, not *instead of* (as seems frequently to be suggested), but *in addition to*, private restitution.

1. *Objection—all wrongs are injurious to the community.* But it is objected that every wrong is a wrong to the community. So, indeed, it is; it is more; it is an offence against humanity at large and the destiny of the whole human race. The naughty boy who climbs over a wall and steals an apple has undoubtedly done an injury to society and to humanity. But nobody with a sense of proportion has such a sensitive conscience that he cannot see a difference, from the point of view of the practical needs of society, between the child who steals an apple and the highwayman who murders and robs his victim.

2. *Objection—no difference in tendency between criminal and civil wrong.* And again it is objected that there is no difference between civil wrong and criminal wrong in quality and tendency. It is impossible, urges Austin, to say that crime is always and necessarily more harmful than tort. This is unquestionable. A moment of inattention on the part of an engine-driver may work more havoc than the lifelong activities of a murderer as implacable as Charles Peace or William Palmer; negligent incompetence on the part of a banker or financier may cause greater ravages to property than the depredations of a thousand pickpockets and burglars. But what does all this prove? It seems intended to prove that crime and tort are two totally different kinds of wrongs. They are nothing of the kind. Crime and tort are complementary, not mutually exclusive. A wrong does not become two different kinds of wrong because it gives rise to two separate legal processes, one by way of punishment and the other by way of compensation. Setting aside the large class of crimes which do not affect private rights at all—to these I will advert presently—nearly all crimes to person or property

are also torts. Indeed, I can think of only one exception—homicide. There is an obvious reason why the slain cannot sue the slayer; there is no obvious reason why the executor of the slain should not sue the slayer, and he could certainly do so in England, as he can in many other countries, if it were not for a mysterious rule of the Common Law which can only be accepted as a fact without being justified as a principle. Conversely, a great many torts are also 'private' crimes to person or property. But this is not universally true, for a reason which leaps to the eyes. When the tort belongs to that class in which liability does not depend upon blameworthiness but simply on the principle of *restitutio in integrum*, there is not necessarily crime, for many crimes involve actual guilty intent. Thus the thief has unquestionably committed conversion, but he who asports and 'casually loses' my umbrella by innocent inadvertence is not a thief. In general, it may be said that those civil wrongs which may be classified as torts of unjustifiable *aggression* are also crimes;¹ those which are usually described as of 'absolute liability' are not crimes. These last are not 'wrongs' at all, in the ordinary, non-legal acceptation of the word; they are classed as tortious wrongs, and must be considered in any analysis of civil liability, because in their results, and in the procedure provided by law to repair those results, they are closely akin to what we may tautologously call the 'wrongful wrongs'.

¹ The 'aggressive' element in crime is emphasized in such a well-known analysis of the subject-matter of criminal law as that of Stephen. He finds in nearly all crime an *attack* of one kind or another. "The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals, or upon rights annexed to their persons; or (5) attacks upon the property of individuals or rights connected with, similar to, rights of property": *History of the Criminal Law* (hereinafter referred to as *H.C.L.*), i. 3.

V. TWO ASPECTS OF CRIMINAL LIABILITY—INTRINSIC WRONGFULNESS AND SOCIAL EXPEDIENCY

This last consideration suggests that there is something more in the notion of crime than a mere breach of a legal rule. There is a strong element of morality in the wrongfulness of crime, and upon that moral element depends, in no small measure, the 'public' aspect of crime—the belief that crime is an offence not merely against one but against all. Throughout the whole jurisprudence of crime we can distinguish two powerful currents of quite different natures, springing from quite different sources. They are the two elements of *intrinsic wrongfulness* and *social expediency*. The first is, I believe, historically the elder, though concerning that question there is much controversy and little certainty; but of the two, in modern societies the principle of social expediency is that which predominates. That is to say, although intrinsic wrongfulness, in the moral sense, is a characteristic of many crimes (as it is of many torts), they are punished not merely because they are wrongful, but because they are wrongful in a degree which is a menace to society. On the other hand, there are many prohibitions of criminal law which have nothing to do with intrinsic rightfulness or wrongfulness; they are prompted by considerations of social expediency more artificial and less self-evident than the prohibition of the more elementary forms of wrongful aggression. The existence of these two very different classes of offences has led to the troublesome distinction between those crimes in which the *mens rea* is *rea* in the ordinary moral sense, and those in which it consists merely in having done the forbidden thing. In the latter class of offences, *mens rea*, in its native meaning, becomes little more than a fiction.

1. *Intrinsic wrongfulness*. If popular language be any guide, it is clear that the word 'crime' denotes in its ordinary signification something which shocks deeply-rooted instincts. We call a thing a crime when we wish to express the strongest disapprobation of it. The major

crimes of 'aggression' are undoubtedly, to average moral judgement, peculiarly wrongful and dangerous—perhaps wrongful *because* they are dangerous. This conception of the inherent wrongfulness of crime is well illustrated by a problem of interpretation which has often arisen in connexion with the action of malicious prosecution. That action lies, as everybody knows, for the malicious and reckless setting in motion of *criminal* proceedings or prosecution. What are 'criminal' proceedings for this purpose? The Courts have declined to limit the meaning of the expression to accusations of offences which are actually punishable by fine, imprisonment, chastisement, or death. They refuse to regard as 'criminal', in the true sense of the word, proceedings for petty, though punishable, offences—a complaint, for example, under the Public Health Act, 1875, for failing to sweep and garnish a filthy house;¹ they understand by a truly criminal prosecution (according to the leading case) any indictment 'involving either scandal to reputation or the possible loss of liberty to the person';² and by an action on the case analogous to that of malicious prosecution (in the strict sense) they have extended the remedy to some (though not all³) civil proceedings which involve aspersions on credit, financial, however, rather than moral—e.g. bankruptcy and winding-up petitions. At least in this connexion, then, it would seem that our Courts detect in 'crime', liberally understood, something of a peculiarly disgraceful nature.

(a) *Mala in se* and *mala prohibita*. In the seventeenth and eighteenth centuries, nobody would have had any hesitation in saying that these acts of manifest moral wrongfulness were *mala in se*, while other and minor offences, involving no 'scandal to reputation' were merely

¹ *Wiffen v. Bailey*, [1915] 1 K.B. 600.

² *Quartz Hill Mining Co. v. Eyre* (1883), 11 Q.B.D. 674.

³ Curiously enough, there seems to be no action for the malicious institution of one kind of civil proceedings in which this remedy would be highly appropriate—i.e. an action for deceit, or other civil proceedings involving allegations of fraud.

mala prohibita. Celebrated cases concerning the sovereign's suspending and dispensing powers turned principally on the distinction between these two kinds of wrongs; those who wish to study the formidable dialectics which they fathered must go to the State Trials and to Vaughan's Reports and read such cases as *Godden v. Hales*, 6 St.T. 1165, and *Thomas v. Sorrell*, Vau. 330. Blackstone has a good deal to say of the distinction between these two kinds of ills. Crimes and misdemeanours, he tells us,¹ such as murder, theft, and perjury, are *mala in se* because they 'contract no additional turpitude from being declared unlawful by the inferior legislature'. (He means by the 'inferior' legislature simply the human lawgiver, the 'superior' lawgiver being the Deity Himself.) But the lesser, or artificial, kind of *mala* are very different in nature and effect.

'In relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty for non-compliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject.'²

Now, we have all been brought up to regard this distinction between *mala in se* and *mala prohibita* as unsound, exploded, and indeed scarcely worthy of serious consideration. We have been taught this for the reason that the seventeenth and eighteenth centuries went much farther than was necessary or defensible in its theories of *mala in se*. Their doctrine was that these wrongs were illegal *because* they were immoral: because, in other words, they had been forbidden by a Divine law which no human authority could possibly abrogate or abridge even if it desired to do so. The notion could not be expressed more neatly than by Blackstone's metaphorical description of

¹ 1 *Comm.* 54.

² i. 57.

the Almighty as a 'superior legislature'. Nowadays all lawyers and most philosophers are agreed that this position is quite untenable; notoriously it involved its exponents in the most inextricable confusion. But, setting aside the unhappy and fallacious dogma to which it led, the notion of the distinction between *mala in se* and *mala prohibita* is entitled to more respect than it has received. Throughout the criminal law of civilized nations there runs an unmistakable current of belief that certain kinds of conduct require direct repression by the organized force of the State because they are evil in themselves.

It is the *mala prohibita* which are the greatest obstacles to any consistent definition of crime in English law. If, as our case-law seems to suggest, the only invariable badge of crime is liability to punishment, then it is, for purposes of technical classification, no less a crime to be without an ash-bin of the pattern prescribed by the County Council than to blow up the Houses of Parliament. Whatever legal terminology may say, common sense simply revolts against such a monstrous use of language. A writer as exact and as 'legalistic' as Fitzjames Stephen flatly declines to accept it. Having mentioned¹ the definition of crime as 'an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act', he proceeds:

'This definition is too wide for practical purposes. If it were applied in its full latitude it would embrace all law whatever, for one specific peculiarity by which law is distinguished from morality is, that law is coercive, and all coercion at some stage involves the possibility of punishment. . . . It would be a violation of the common use of language to describe the law relating to the celebration of marriage, or the Merchant Shipping Act, or the law relating to the registration of births, as branches of the criminal law. Yet the statutes on each of these subjects contain a greater or less number of sanctioning clauses which it is difficult to understand without reference to the whole of the acts to which they belong. Thus, for instance, it is felony to celebrate marriage otherwise than

¹ *H.C.L.* i. 1-2.

according to the provisions of certain Acts of Parliament passed in 1823 and 1837, and these provisions form a connected system which cannot be understood without reference to the common law on the subject. These illustrations (which might be indefinitely multiplied) show that the definition of criminal law suggested above must either be considerably narrowed or must conflict with the common use of language by including many parts of the law to which the expression is not usually applied.'

(b) *Nomenclature of crimes in English law.* We are met here by a difficulty which is purely linguistic. In many systems of law, offences of varying degrees of seriousness bear quite different names. For example, the word *crime* to a Frenchman conveys a definite type of grave offence which is triable in a Court of Assize. Below the degree of *crimes* are offences known as *delicts*, triable by the Correctional Court, which is only the Civil Tribunal of the *arrondissement* sitting for the disposal of penal matters. At the bottom of the scale are a large number of petty offences, tried by professional Justices of the Peace; these are *contraventions*, and liable only to penalties of the most trifling kind. Similarly German law knows three classes of punishable offence—*Übertretung*, *Vergehen*, and *Verbrechen*: and analogous distinctions exist in nearly all European systems. But unhappily in England we have only the single word 'crime'—which by derivation signifies nothing more than a charge or accusation—to describe all punishable offences; and these offences are technically divided into four or possibly five kinds—treason, treason-felony, felonies, misdemeanours, and a large class of 'contraventions' which go by the clumsy description of 'offences punishable on summary conviction'.¹

This awkward classification is based partly on outworn historical distinctions and partly on procedure. 'Felony' in the Middle Ages meant what it still means in common speech—viz. a particularly grievous kind of criminal

¹ In its strictest technical meaning, the term 'misdemeanour' embraces all punishable offences below the degree of felony: see *Russell on Crimes* (8th ed.), 10. But this is not its common acceptance.

offence. Its gravity was shown by the fact that it was punishable by loss of life or member (or by outlawry if the offender fled from justice), and by a penalty which many a felon, if he had any tenderness for his family, feared even more than death—viz. total forfeiture of his property. There were comparatively few of these heavy iniquities: Maitland tells us¹ that in the twelfth century there were only seven—deadly sins, as it were—which were treason, homicide, arson, rape, robbery, burglary, and grand larceny. In the course of centuries, felonies spawned and multiplied: the savage penalties to which they were subject lived on: until, by the beginning of the nineteenth century, there were more than two hundred capital crimes. I repeat that criminal law is the most reactionary of all branches of law: to modern eyes the English criminal law which was still in full vigour when Queen Victoria came to the throne seems an incredible relic of barbarism: and the only thing to be said for it is that it was, on the whole, less ferocious than the criminal law of most other European countries.

When felonies ceased to be crimes characterized by capital penalty, forfeiture, outlawry, and (in homicide) the old process of 'appeal', they ceased to have any real meaning in our law as a separate class of crimes. The differences which now exist between felony and misdemeanour are technical, archaic, irrational, and valueless. Their abolition has been advocated again and again, but they are still with us, and until they disappear it is quite impossible to devise any single, consistent definition of a crime in English law. Certainly the distinction is not one of kind: nor is it even one of degree. It is still true that the most serious crimes are felonies: but it is impossible to say, conversely, that a misdemeanour is *eo ipso* an offence in the second grade of gravity, like the French delict. It is largely a matter of chance whether any given offence is, technically, a felony or a misdemeanour; and this because statute, which now governs the larger part of criminal law, has been extra-

¹ P. & M. ii. 511.

ordinarily indiscriminate in the creation of new felonies and misdemeanours.

2. *Social expediency.* In most felonies and misdemeanours it is easy to see an element of inherent wrongfulness. Not invariably: to borrow Stephen's example, it is felony to celebrate a marriage in an irregular form, but it would be difficult even for Chief Justice Vaughan to see in this statutory offence a *malum in se* comparable with wilful murder. However, if we leave room for numerous and erratic exceptions, we may say broadly that the more heavily punishable offences are ill-in-themselves according to average moral judgement. But there are in modern States a very large number of punishable offences which it is impossible to regard as intrinsically flagitious. They are offences which are dictated solely by considerations of social expediency.

In one sense, all criminal law is dictated by such considerations. We no longer consider that the prohibition of *mala in se* is merely a declaration of a pre-existing natural law: we do not, in other words, say that attacks on person or property are forbidden solely because they are morally wrongful: they are forbidden because they are morally wrongful in a manner and degree which are manifestly prejudicial to the interests of society. Not all moral wrongdoing is deemed to be injurious to this extent: there is no secular penalty, for example, for sexual incontinence: but such moral wrongdoing as, in the view of law, operates directly to the detriment of society in general is criminal. It may be socially dangerous for one of two reasons—either because it attacks the persons or property of individuals (who nearly always have a private remedy in addition) in such a manner as to cause alarm to other individuals: or because it attacks some vital part of the organization of the State. In addition, there are a large number of acts, chiefly but by no means all in the nature of 'contraventions' punishable by summary jurisdiction, which are not necessarily wrongful in themselves, but are inexpedient, and therefore penalized, because they interfere

with some part of the State machinery. There may be many reasons, economic, political, administrative, cultural, hygienic, which make such acts undesirable; and it is one of the least pleasing features of the modern law of petty offences that as the machinery of government becomes more reticulated, it can be made effective only by creating numerous penalties for non-compliance with it. It is regrettably easy for the executive officer to devise a complicated administrative scheme and to lend a sanction to each portion of it by adding a penalty of summary jurisdiction. The number of such minor penalties in every modern State is huge: we seem to be getting back to the medieval conditions in which a man could scarcely stir hand or foot without incurring some trivial amercement payable to the King:¹ and this swarm of stinging insects does not diminish when we remember that a large number of local authorities school our conduct with abundant 'by-laws for good order and behaviour'. However, I do not wish to exaggerate this aspect of social discipline; it is still possible for a careful man to exist for considerable periods together without paying fines or going to prison.

During the formative period when the Common Law principles of our criminal jurisprudence were being built up—i.e. before the field became so copiously covered by statute—the 'public' aspect of crime was constantly insisted upon. Again and again in eighteenth-century cases judges, and especially Lord Mansfield, emphasized it. Perhaps the most characteristic distinction between public and private wrong is that drawn by Lord Mansfield in *R. v. Wheatley* (1761), 2 Burr. at p. 1127 (an indictment for selling to the prosecutor short measure of beer):

"The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealings: so, if a man defrauds another with false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to

¹ P. & M. ii. 513.

cheat: for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries: they are public offences.'

In 1789, in *Young v. R.*, 3 T.R. at p. 104, Buller J. adopts this as expressing the typical distinction between tort, or breach of contract, and crime. A few years later, in *R. v. Higgins* (1801), 2 East at p. 21, Lawrence J. says: 'All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable.' And as late as 1854, Pollock C.B. observes in *Jeffreys v. Boosey*, 4 H.L.C. at p. 936 (but the observation is very much *obiter*): 'I think the Common Law is quite competent to pronounce anything to be illegal which is manifestly against the public good.' Upon this broad and vague principle, a number of acts which, it was strenuously contended by the defence, were not offences known to English law, were held to be indictable: e.g. not brewing beer, with the intent and effect of diminishing the public revenue;¹ giving a bribe in order to procure a public office;² supplying to prisoners of war food unfit for human consumption;³ supplying unwholesome bread to a military asylum;⁴ raising the price of the public funds by false reports of the death of Napoleon and rumours of an early peace.⁵

Discussing⁶ these and similar cases, Stephen is strongly of opinion that they belong to a phase of development now definitely past, and that the function, necessary in its own day, which they performed has now been supplanted by statute. But the old doctrine has not entirely disappeared. It appears to be still a principle of our criminal law that an act calculated to produce 'public mischief' is, though not specifically declared to be so by any statute, *prima*

¹ *R. v. Starling* (1663), 1 Lev. 125.

² *R. v. Vaughan* (1769), 4 Burr. 2494, a case much discussed and relied upon in *R. v. Whitaker*, [1914] 3 K.B. 1283.

³ *Treeve's Case* (1796), 2 East P.C. 821. Cf. 4 Bl. Comm. 161.

⁴ *R. v. Dixon* (1814), 3 M. & S. 11.

⁵ *R. v. de Berenger* (1814), 3 M. & S. 67.

⁶ 3 H.C.L. 357 f.

facie an indictable offence.¹ So much, however, of the principle as still survives has been almost entirely absorbed by the law of criminal conspiracy. Most of the early cases above mentioned possess a strong element, express or implied, of conspiracy; and even the modern law of conspiracy retains an extraordinarily wide and undefined element of the suppression of 'public mischief'. It is well known that the agreement of two or more persons may be a criminal conspiracy although the end which it has in view is *per se* neither a crime nor a tort, but merely an act gravely prejudicial to the public interest.² It is true that when questions of 'public mischief' arise nowadays, they will nearly always be covered either by statute or by the extremely elastic law of conspiracy; but even in our own times the Courts sometimes have to pay attention to the old doctrine, as will be realized by reference to such cases as *R. v. Porter*, [1910] 1 K.B. 369 and *R. v. Brailsford*, [1905] 2 K.B. 730, which is discussed *post*, p. 309 n. 1.³ It is even said by some writers that the publication of false news to the public detriment is an indictable offence;⁴ and it is very possible that the question may some day come before the Courts for decision.

(a) *Classifications of crimes.* The 'public' aspect of crime becomes apparent when we attempt to classify criminal offences into interrelated groups.

The schemes which have been proposed for the classification of crime are innumerable and extraordinarily diver-

¹ See *Russell on Crimes* (8th ed.), 10 and 1400 ff.; Stephen, *Digest* (7th ed.), Art. 230; Archbold, *Criminal Pleading* (27th ed.), 1317.

² See Kenny, *Criminal Law*, ch. xviii; *R. v. de Berenger*, *ubi sup.*; *Vertue v. Lord Clive* (1779), 4 Burr. 2473.

³ In 1930 a stipendiary magistrate had to consider whether any offence had been committed by a woman who falsely informed the police that she had 'kidnapped' a child, whereas she had in fact returned it to its mother: see *The Law Journal*, Sept. 20th, 1930, p. 170. The learned magistrate, however, was able to convict the woman of another offence, and was dispensed from the necessity of settling the hitherto undecided question whether hoaxing the police is an act involving 'public mischief'.

⁴ See *Odgers on Libel* (5th ed.), 459; *Russell on Crimes* (8th ed.), 1405.

gent. No good purpose would be served here by attempting to collate those which have been suggested by various jurists of eminence. One of the best known is that propounded by Bentham in *Morals and Legislation*:¹ it is adopted and expanded by Austin² in several of those tables or conspectuses which were so dear to his heart. Bentham had a genius for classification, and for inventing terminology to fit it; but no part of *Morals and Legislation*, or indeed of any of his principal writings, is less satisfactory than his classification of crimes. It is arbitrary in the extreme, and seems to rest on no consistent principle. It is astonishing, for example, to find him setting apart a whole separate group of what he calls 'semi-public offences', which are so described because they do not injure the whole of society, but only a neighbourhood or class, 'through calamity'. On the same topographical principle, we might classify crimes as north-of-England offences and south-of-England offences, or we might classify crimes to property as those which affect owners of money, owners of silver, owners of jewellery, and so forth—in fact, there is no limit whatever to classifications of this kind. When he comes to a group of offences which will not adapt themselves to any of his groups or classes, Bentham escapes the difficulty, as he too often did, by bundling them together with a polysyllabic word: they become instantly 'multiform' or 'heterogeneous' offences. Unfortunately for such summary methods, there is, as I shall presently mention, scarcely a crime which is not 'multiform' or 'heterogeneous'.

It is not surprising that there should be this embarrassing diversity in the suggested classifications of crimes, for, plainly, everything depends upon the consideration which is chosen as the basis of grouping. Crimes may, for example, be classed according to the motive which prompts them—thus we may speak of crimes of anger, crimes of jealousy, crimes of lust, crimes of cupidity, and so forth. Or they may be classed according to the

¹ Ch. xvi. Cf. 'Theory of Legislation', Part I of *Principles of the Penal Code*.

² Lects., pp. 1101-5.

object against which the offence is committed—as, crimes to property and crimes to the person. Other possible principles of arrangement are the kind of punishment or the kind of procedure applicable; the degree of moral wrongfulness; the gain which the offender has in view—money, personal condition, benefit to self or family, and so forth; or the element in public or private life which is injured by the criminal act—the security of the State, the safety of the person, the institution of property, of marriage, &c. I agree with Dr. Charles Mercier¹ in thinking that this last is ‘the most secure basis for a natural and scientific arrangement of offences’, for it keeps most clearly before us the social repercussions of criminal acts, and therefore, by inference, the reasons which lead the State to treat such acts as requiring penal repression.

(b) ‘*Multiformity of crimes*’. But neither this nor any other system of classification will be wholly without its chinks and fissures. For it is clear that many crimes have several different social effects, according to the point of view from which we consider their immediate and their ultimate consequences. Thus all offences to person and property do immediate harm to the person or thing attacked, but they also have the secondary consequence of creating general public alarm. Suicide may be variously regarded as an ‘offence against self’ (though, *me judice*, there is no such thing in law), or an injury to public sensibilities, or an injury to racial integrity.² The offence which is ‘not to be named among Christians’ may be considered as an injury to racial integrity; but in the old law it was classed with heresy as an ‘offence against God’,³ its origin, very probably, being traceable back to an Hebraic interdiction which, though clothed with religious sanction, was

¹ In *Crime and Insanity*, Home University Library (Messrs. Thornton Butterworth). This little book, written by a medical expert, contains a far more clear and scientific discussion of the classification of crimes than any technical legal work known to me. The author, however, falls into error in stating, at p. 156, that false imprisonment is not a crime in English law. It is a misdemeanour at Common Law.

² See *post*, p. 303 n.

³ See Hawk. P.C., chs. ii and iv.

really inspired by the struggle in Asia Minor for tribal survival. Rape, again, is not only harmful to racial integrity, but is an aggravated assault and battery to the person. The offence of smuggling, to take a 'public' crime at random, may be regarded either as a breach of the peace or as an injury to the public revenue. The crime of sending an unseaworthy ship to sea may be viewed either as a wrong affecting a limited class of persons 'by calamity', as Bentham would say, or as a threat to public safety in general. Wherever we turn, we shall find these possible differences of points of view; but some concessions must be made to any scheme of classification, and we can keep only one principal object in view at a time. The object here pursued is very much the same as that laid down long ago in *Heydon's Case* (1584), 3 Rep. 7a, for the interpretation of statutes—namely, to discover 'the mischief and defect' in contemplation, and 'what remedy the Parliament [or the Common Law] hath resolved and appointed to cure the disease of the commonwealth'.

(c) '*Public*' and '*private*' crimes. From the earliest times a distinction has been drawn between 'private' and 'public' offences: and I am acquainted with no reputable scheme of classification which does not contain it in some shape or other. The reason is manifest. Let it be granted that all crimes, and indeed all wrongs, react to the public disadvantage: yet it is plain that there are some offences which *primarily* injure specific persons or their rights and *secondarily* injure the public interest, while there are others which *directly* injure the public interest, represented by various factors of social organization, and do not injure specific individuals at all, except in the very remote and indeterminable sense that ultimately every individual is a joint beneficiary in the public interest.

In modern States, 'public' crimes considerably outnumber 'private' crimes. This fact may be illustrated by an analysis of English criminal law at the present time. An attempt, which will be found in the Appendix, *post*, p. 295, is here made to assemble all indictable offences

known to English law, and to classify them according to two main divisions: first, into 'private' and 'public', in the sense which has already been explained: and second, into the different aspects of private existence and social co-existence which they seem to affect.

As the basis of this classification, the following works have been used: Stephen's *Digest of Criminal Law*, 7th ed., 1926; Archbold's *Criminal Pleading, Evidence and Practice*, 27th ed., 1927; and an invaluable Blue Book, *Home Office Criminal Statistics, England and Wales*, 1928, H.M.S.O., Cmd. 3581. An appendix to Stephen's *Digest* contains an alphabetical list of indictable offences, and the volume of *Criminal Statistics* contains a list in which the offences are arranged under different headings. *Criminal Statistics* has been my chief guide for details, though I have not adopted its arrangement.

It is hoped that this list is fairly complete: but it cannot be entirely so. So far as possible, all indictable offences have been separately tabulated, however closely akin they are in nature; and in the case of wrongs to property, this has led to a heavy but unavoidable multiplicity of certain kinds of criminal acts which are very similar to each other. In a few cases, however, it has not seemed worth while to subdivide the principal offence into its various possible forms; for example, it seems scarcely profitable to distinguish maintenance, champerty, and barratry (II. 9. 16 in Appendix) into three separate crimes, nor yet election offences (II. 1. 12), nor offences arising out of the relationship of employer and employee (II. 8. 6), nor the rare cases of criminal breaches of contract (II. 12. 11), nor various offences which may be committed by money-lenders (II. 14. 3), nor bankruptcy offences (I. 3. 53). The most difficult cases are those of forgery and perjury. Stephen gives thirty-seven different varieties of forgery of documents, instruments, &c., specified by statute; taking these special cases in conjunction with the Common Law offence of forgery (I. 3. 74), the practical result is that it is now scarcely possible to forge anything which is forgeable

without committing felony or misdemeanour, and the simplest arrangement therefore seems to be that which is adopted in the offences I. 3. 71-4. As to indictable false statements, there appear to be nine statutory cases which amount to perjury, and it seems best to group these with perjury as one criminal offence (II. 9. 5).

Four matters which may properly be considered as a kind of supplement or appendix to criminal law, and which it is impossible to classify satisfactorily, have been left out of account—viz. the offence of conspiracy: the rules relating to accessories: the rules relating to habitual criminals: and the rules relating to attempted or conative crimes. With regard to the last mentioned, it is enough to bear in mind the general rule that it is itself an indictable offence to aid, abet, counsel, procure, incite, or attempt any indictable offence; but in a few cases, where the attempt (e.g. attempted murder, I. 1. 2) is an offence governed by special statutory rules, it is tabulated separately.

The list includes only indictable offences. It would be an almost endless labour to gather and classify all non-indictable offences of summary jurisdiction; but it is believed that if this were done, there would be found in these minor offences an even greater preponderance of public over private wrongs than in indictable crimes.

The result of the classification is that there are 331 indictable offences known to English law, 128 of which are private wrongs, and 203 are public wrongs. Of the 128 private crimes, no less than 93 consist of attacks upon property, many of them being very closely akin in nature and effect.

(d) *The public aspect of crime predominates.* The public aspect of crime has continuously grown and in modern societies is the dominant characteristic of criminal law. Private wrongs demand private restitution—that is a principle of corrective justice; but many, indeed most, private wrongs, and in addition a large number of disobediences which are not private wrongs at all, also

demand public repression in the collective interest. There we may leave the matter, with this further observation only. It is pertinent to bear in mind the preponderance of public over private crimes when we are told, as we are constantly told, that all legal duties are relative to rights. It would seem, on the contrary, that our criminal law swarms with duties which are not correlated to legal rights, but are 'absolute' duties, in Austin's sense, imposed by the organized power of the State in the general interests of society. That view I have urged elsewhere¹; and in some sort the present discussion has been intended to fortify, by further examination of the criminal law, the contentions there advanced.

¹ *Ante*, pp. 184 ff.

THE PRESUMPTION OF INNOCENCE¹

IF the average Englishman were asked what he considered to be the outstanding characteristic of English criminal law, or indeed of the whole legal system, he would probably answer without a moment's hesitation: 'A man is presumed to be innocent until he is proved guilty.' He would almost certainly add, with no small satisfaction, that this was one of the numerous particulars in which the Briton had the advantage over the well-meaning but unenlightened foreigner: that in France, for example, it was a settled rule of law that an accused person was guilty until he was proved innocent. For this widespread belief there is, so far as I know, no authority whatever; and indeed it requires very little reflection to see that no civilized system of law could possibly avow and apply such a principle. Its result would be either to put a deadly weapon into the hands of the vindictive private accuser: or else to invest the State with terroristic powers which no free Occidental people could tolerate.

Nevertheless, it is unquestionable (to pursue the comparison which is dear to popular opinion) that the position of an accused person in France is different from that of a prisoner in England in some important respects. The whole system of preliminary examination of the accused, the close resemblance at many points between the presiding judge and a prosecuting counsel, the indefiniteness, almost amounting to the absence, of rules of evidence, the frequent accompaniment of popular and newspaper partisanship—all these elements are so different from what seem to the Englishman to be elementary principles of justice that he is apt to be uncompromising and contemptuous in his condemnation of them. He does not remind himself, as he should, that national legal institutions, like most other things national, differ infinitely, that what works

¹ Annual Address to the California Chapter of the *ΦBK* Fraternity, Berkeley University, May 7th, 1931.

well in one country would work ill, or not at all, in another, and that therefore in such matters it is extremely dangerous to be dogmatic. There are many features of French criminal law which it is certainly difficult, in the abstract, to admire or to justify, and the defects are felt by many French critics no less than by foreign observers; and yet it may be doubted whether on the whole criminal justice miscarries more often or more grievously in France than in any other civilized country.¹

It is inevitable, however, that Englishmen should be struck by the contrast; for nothing is more remarkable in the modern criminal jurisdiction of England than the

¹ From the thirteenth century onwards there has existed one great difference between the French and the English systems—namely, that the former has been inquisitorial and the latter accusatory. The accusatory form, which makes a criminal trial resemble a litigation between the Crown and the prisoner, undoubtedly entails a 'presumption of innocence' in the sense that it places upon the prosecution the onus of affirmative proof. To this extent, there is a real contrast between the English and the French method, though certainly it does not follow that in the inquisitorial procedure there is any actual presumption of guilt. Sir William Holdsworth is of opinion that the methods adopted by the Star Chamber were influenced by Continental theories—that there was, in fact, in the sixteenth and seventeenth centuries a sharp struggle between the Continental and the Common Law conceptions of criminal procedure; and that the Great Rebellion and the Revolution settled the issue in favour of the Common Law doctrine. Whether or not there be sufficient evidence of direct borrowing from Continental principles, it is clear that English criminal law, under the influence of the Star Chamber, was gravitating towards an inquisitorial procedure which, after the great political conflicts, was definitely expelled in favour of the accusatory method. See Holdsworth, *H.E.L.* iii. 620 ff., v. 190 ff., and ix. 229 ff. But it is one thing to say that the accusatory system places the onus of evidence upon the prosecution, and another to say that it implies, substantially, an actual presumption of innocence in favour of the accused. The real difference between the two systems is that in the one case a charge must be accompanied by at least *prima facie* evidence, while in the other it may be pursued upon mere suspicion. But accusation may nevertheless, in itself, raise a greater probability of conviction than of acquittal; that question may depend, according to the state of public opinion, upon the relative strength and weakness, credit and discredit, of accuser and accused; and in our early law the great preponderance of advantage seems to have lain with the accuser.

consideration which is shown to the accused. The rules of evidence have shaped themselves progressively and rapidly in his favour. The presumption of innocence and the doctrine of 'reasonable doubt' have been so constantly impressed upon juries that these principles have come to possess, as I shall endeavour to show, some of the characteristics of superstition. There is a deep-seated conviction that prosecution should never degenerate into persecution; and a growing professional tradition, encouraged by judges and undoubtedly appreciated by juries, insists that the case for the Crown shall be presented with moderation, with impartiality, and even with some degree of forbearance. There is a feeling among juries that the prisoner is pitted against heavy odds, especially in cases when his legal representation is not of the most skilled or eminent; and any marked anxiety in prosecutor or judge to secure a conviction is likely to result in acquittal, not seldom in perverse acquittal. I am referring at present to courts in which a professionally trained judicial element predominates; when the Bench is amateur or semi-amateur, as in many courts of Petty Sessions, it may be necessary to make certain reservations. Before such tribunals it is inevitable that 'justice as between man and man' should tend to become justice as between man and policeman; and the 'volunteer' system, though it has served its turn in the past, does not nowadays meet with universal approval.

The magnanimous disposition of our law towards the accused is the more striking because it is perfectly well known to every intelligent person that the vast majority of accused persons are guilty of the crimes with which they are charged. Assuming general confidence in the police system—and there is considerable, though perhaps increasingly critical, confidence in it in England—it is very difficult to resist the impression that if a man is in the dock, there is *probably* a very good reason for his being there. The humiliating circumstances which surround the prisoner accentuate that impression: there is the fact, of which everybody in court is aware, that the majority of

prisoners are not sinning for the first time and that their sins are perfectly well known to the police: there is the fact, of growing moment, that crime nowadays is a highly organized and in some respects a highly scientific business and that the forces of law and order need all the support which the public can give them: and there are adventitious but not insignificant circumstances—for example, that most persons who are accused of being criminals *look* as if they were criminals—a detail which ought to be quite irrelevant, but, human prejudices being what they are, seldom is so in fact. And it is not a matter of mere prepossession that the majority of criminal accusations are justified: it is a matter of incontrovertible figures. According to the latest criminal statistics,¹ in the year 1928, of the 63,194 persons who were brought before Courts of Summary Jurisdiction for indictable offences, only 5,736 were acquitted; of the 7,282 persons who were tried at Assizes or Sessions only 1,193 were acquitted (including in that number the cases in which the Grand Jury ignored the Bill); of the 597,555 persons who were charged with non-indictable offences before Courts of Summary Jurisdiction only 41,243 were acquitted.

But if these proved facts of delinquency seem to support something like a ten-to-one presumption of guilt, there is no doubt that the theory of our law and the temper of our tribunals insist on an equally strong presumption of innocence. This is often thought of and spoken of as one of those primordial British institutions which have roused writers like Fortescue and Blackstone to such eloquent enthusiasm. It is the purpose of these observations to show that it is a very modern growth, not older, indeed—at all events, in the sense in which it is now understood—than the nineteenth century.

Prior to that period, the criminal law presents a curious paradox. The learning of Pleas of the Crown undoubtedly does contain what may be called the plati-

¹ See *Home Office Criminal Statistics*, Cmd. 3581, H.M.S.O., 1930, pp. xxiii, xlv, and 60.

tudes of innocence. Fortescue seems to be the first and true inventor of one of the most persistent of these commonplaces. In the twenty-seventh chapter of his *De Laudibus*¹ he eulogizes, as a bulwark of justice, the prisoner's right of challenging the array, and Selden, in his notes to the text, adds some triumphant examples of the reversal of convictions. For the modern reader the effect is a little marred by the circumstance that most of the reversals seem to have taken place after the innocent accused had been put to death. Fortescue continues: 'Indeed, one would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally.' I do not know whether this sentiment passed at once into a legal aphorism, but two hundred years later it reappears in a famous passage in Hale's *Pleas of the Crown*,² concerning which Bentham had much to say in his *Rationale of Evidence*.³ Hale, speaking from judicial experience, admits that 'presumptive', or what we nowadays call circumstantial, evidence may 'go far to prove a person guilty', but gives some examples (one of them drawn from Coke) of its deceptiveness. Concluding, then, that presumptive evidence 'must be very warily pressed', he restates Fortescue's principle, but with a considerable mathematical difference: 'it is better *five* guilty persons should escape unpunished than one innocent person die.' He even gives the doctrine the garb of a Latin maxim, though I suspect that this was his own invention: *Tutius semper est errare in acquietando quam in puniendo, ex parte misericordiae, quam ex parte iustitiae*. While holding this up as an ideal of justice, he admits that it has certain inconveniences—for example, there is difficulty in obtaining satisfactory direct evidence of witchcraft, and hence many undoubtedly guilty persons escape! It is not, apparently, till the beginning of the nineteenth century that our platitude is judicially described as a 'maxim' and is fixed firmly in its ratio of ten-to-one. In 1823, in *R. v. Hobson*,

¹ Gregor's edition, 1775.² ii. 289.³ *Works*, vii. 69.

1 Lew. C.C. 261, we find Holroyd J. declaring: 'it is a maxim of English law that *ten* guilty men should escape rather than that one innocent man should suffer.' And in the same case he lays down *ex cathedra* another familiar principle: 'The greater the crime the stronger is the proof required for the purpose of conviction.'

I have been unable to discover, however, that the dogma 'A man is presumed to be innocent until he is proved guilty', in the form of a brocard, anywhere occurs before the nineteenth century. One or two maxims of similar tendency appear to be in current use. Viner, for example, under the brief title on 'Presumptions' in his *Abridgement*, cites (but without authority) the maxim: *Odiosa et inhonesta non sunt in lege praesumenda et in facto quod se habet ad bonum et malum magis de bono quam de malo praesumendum est*. In Starkie's *Evidence*,¹ the first comprehensive technical treatise on the subject, published in 1824, this maxim is made the basis of the presumption of innocence, and Starkie appears to suppose that it was derived from Roman Law: which it was not.² A somewhat analogous maxim, of early date, and now very familiar, is: *Omnia praesumuntur rite (or solenniter) esse acta*.³ But this principle

¹ iii. 934.

² It appears to have been one of Coke's numerous Latin impromptus, and occurs in *The Chancellor of Oxford's Case* (1614), 10 Rep. 43 b, 56. The authority cited for it is *Tyrer v. Littleton* (1612), 2 Brownl. 187, but the actual phrase does not occur in that case. I cannot discover that it ever became a current maxim, though Viner cites it as such. Properly interpreted, it refers only to the interpretation of *statute (in lege)*, and this was its relevance in *Tyrer v. Littleton, ubi sup.*, which was a decision on the statute 13 Eliz. c. 5 against fraudulent conveyances. Cf. D. 1. 3. 19: *In ambigua voce legis ea potius accipienda est significatio, quae vitio caret, praesertim cum etiam voluntas legis ex hoc colligi possit*. Starkie appears to have understood Coke as if *in lege* were *in iure*. His identification of the principle with the Civil Law raises the question whether Roman Law had any equivalent of the presumption of innocence. I believe not; but the following *regulae iuris antiqui* are analogous: *semper in dubiis benigniora praeferrenda sunt* (D. 50. 17. 56); *favorabiliores rei potius quam actores habentur* (D. 50. 17. 125); *in re dubia benigniorem interpretationem sequi non minus iustus est quam tutius* (D. 50. 17. 192. 1).

³ Co. Litt. 6 b, 332.

does not seem to have referred at first to the rightfulness or regularity of acts generally, but rather to the probable correctness (proof to the contrary being obviously difficult) of 'things of great antiquity'.¹ Nowadays its scope is restricted to the proper performance of specific duties, public or private, or acts-in-the-law, and it has little relevance to the presumption of innocence. Coke does not say more than that the evidence against a prisoner must be 'manifest':² and Blackstone, remembering Hale's warnings, lays it down that 'all presumptive evidence of felony should be admitted cautiously'.³ The first explicit statement of the modern rule which I have discovered is in Phillipps's *Evidence*,⁴ published in 1814: 'That innocence is to be presumed, till the contrary is proved, may be called a presumption of law, founded on the universal principles of justice.' This, I think, is the first time that the probable innocence of an accused person is erected to the position of an actual *praesumptio iuris*, and we shall see that that conception of it gave rise to considerable difficulties and contradictions. Its germ may have lain in the developing doctrine that the prisoner's guilt was 'manifest' only when it was established 'beyond reasonable doubt'; and in the opinion of Wigmore⁵ this principle had become established about the end of the seventeenth century, and was probably first given general currency by Starkie in the passage which has been mentioned.

On the whole, then, it is safe to say that before the beginning of the nineteenth century there was no explicit *presumption* of innocence, although there was a growing realization that circumstantial evidence should be regarded with caution when a man's life and property were at stake; and there was also a certain amount of pious generalization in favour of merciful acquittal rather than hasty condemnation. And yet, to the modern reader, this latter

¹ 2 Inst. 118, 362: 'After a long possession *omnia praesumi debeant solemniter esse acta*.' See *Cope v. Bedford* (1627), Palm. 327, and *Crimes v. Smith* (1588), 12 Rep. 4.

² 3 Inst. 137.

³ 4 Comm. 358.

⁴ Vol. i, ch. 7, s. 2.

⁵ *Evidence*, para. 2497.

frame of mind seems to accord ill with the records of ancient criminal trials. To most readers to-day they convey an irresistible impression that the prisoner was regarded by the whole court with a degree of suspicion and hostility which would now be regarded as a violation of the most elementary principles of criminal procedure. In the main, that impression is not unjust; the attitude towards the prisoner has fundamentally changed, for reasons which will be discussed presently; and it can scarcely be doubted that whatever the platitudes of innocence may have been, the suspect laboured under an onus of self-exculpation which would now be regarded as the very reverse of penal justice. On the other hand, it must be remembered that our records are incomplete. The State Trials, it is true, are a remarkable storehouse; most of us have probably derived our ideas of the criminal justice of former days from that collection, and we wax indignant, with Macaulay, concerning the ferocities which they too often display. This is especially true of the high crimes of great offenders, which are the best known of the celebrated trials. But it is not quite fair to judge the whole criminal law by treason trials. A treason trial was not in reality a trial at all according to modern notions.¹ It was, rather, a solemn form of condemnation of one who had come in conflict with the government.² The royal power was perpetually insecure, and could brook no competition.

¹ As Professor Holdsworth points out (*H.E.L.* v. 191), the most important part of the procedure was the preliminary investigation—a most arbitrary process, which may by courtesy be called a ‘trial’, but the chief purpose of which was to arrange the evidence in favour of the prosecution.

² Discussing the trial of Raleigh, Sir John Macdonnell wrote (*Historical Trials*, 192): ‘Remember the imperfection of what is scarcely less important than independent and uncorrupt judiciary. I mean the existence of a body of advocates with large and well-defined rights. No such position belonged to lawyers at this time. They might not defend men charged with high treason, they dared not speak their minds except at the risk of professional disgrace. They had no right to appear in many cases which came before the courts. In these circumstances what security was there for a fair trial? If a judge in those days had frankly charged a jury according to the facts of the situation it would have been in some such terms as these: “If

Every one who achieved greatness must have been perfectly conscious of the risk which attended greatness—namely, that the price of unsuccessful opposition, open or conspiratorial, and the price even of innocent but excessive eminence, was royal disfavour: and royal disfavour had only one method of expressing itself finally and effectually—i.e. upon the scaffold. Uneasy lay the head that wore a crown, but uneasier still lay the head that wore a coronet. The mere committal for high treason was equivalent to conviction, and differed only in point of form and ceremony from the simpler injunction, 'Off with his head!' Or conversely, we may say that an acquittal in any of the great political trials and impeachments would have been a direct and deadly blow at the Crown; and with the exception of *Throckmorton's Case* (1554), 1 St. T. 862 (which was followed by the imprisonment of the jury), I do not think there is any example of such an acquittal. The long and melancholy tale, therefore, of those who put their trust in princes, or of princes who put their trust in themselves, belongs to the history of politics rather than of law; and it is unfortunate that so many of our criminal records, until we reach the *Nisi Prius* reports of the nineteenth century, are tinged with politics. Of the ordinary routine of criminal justice in dealing with common and petty malefactions we have but scanty records. It is probable that it was far less vindictive than the State Trials would lead us to suppose; and it is certain that long before the great reforms of the nineteenth century were inaugurated, juries were showing an increasing anxiety to avoid the condign penalties of conviction for felony.

All this conceded, however, the prisoner, through the mere fact of being accused, stood in far greater jeopardy, and had far less chance of establishing his innocence, than to-day; and this was inevitable in view of the manner in which the criminal law had grown up. It is inherent in the very nature of the medieval forms of trial that the mere you acquit the prisoner I shall be dismissed and you will go to prison. Consider your verdict."

fact of accusation raises a strong presumption of guilt. In other words, accusation in itself means that the case is already, to a large extent, prejudged.

For the accusation is not brought, as usually nowadays, by some central investigating authority which has reasons for suspicion and which takes action on behalf of the community; it is brought by a man's own neighbours, who of their own knowledge are almost certain of his guilt, and who, indeed, are in a better position to know it than anybody else. The system of frankpledge made every man in some sort his brother's keeper, and was an ingenious device for the self-discipline of a community the sparseness of which made the device practicable and probably, on the whole, successful. Under this system, accusation cast a heavy burden upon the accused. He appears to have stood condemned, for all practical purposes, unless he could produce preliminary evidence of good character. A responsible person—the pledge or *borh*—must vouch that, in modern phrase, ‘nothing is known against him’; but this is only a preliminary stage, and even with this degree of credit in his favour, he must proceed to find twelve respectable persons who will swear to the validity of his oath of innocence—which is only another way of swearing to his good character. If he cannot find so many sponsors—and for a poor and obscure man this cannot always have been easy—he must go to the single ordeal of the hot iron or the hot water—a test which will always remain a mystery to the modern mind, for it is incredible that anybody can have survived it, if it was genuinely administered:¹ and yet strange things may have been possible in days when faith was still naïve and before profane materialism began to prefer the plain judgements of earth

¹ ‘Such evidence as we have seems to show that the ordeal of hot iron was so arranged as to give the accused a reasonable chance of escape’: P. & M. ii. 599. But how was it arranged? By corruption of the officiating clergy? Thaumaturgy always has its commercial aspects. Perhaps this was in the mind of William Rufus when, after fifty men sent to the ordeal of iron had all escaped, he waxed satirical about the judgements of heaven: P. & M. *loc. cit.*

to the inscrutable judgements of heaven. The accused under this system was indeed a highly suspect person. This is perhaps not so remarkable when the accusation had been solemnly made by the reeve and four men of his township, who doubtless had a fairly shrewd estimate of his character and conduct. But it was a curious position when the charge was brought, as it apparently might be brought, by a single individual. It must always be remembered, however, that the accusation was supported by a very solemn oath, and so long as oaths retained their magic, doubtless the theory was that there must be some substance in the accusation, or else the accuser would be blasted on the spot. It is very probable, too, that the oath was that form of ritual pronouncement—*verba certa et sollemnia*—in which the least slip of tongue would bewray malice and false witness.¹

The situation of the accused was even more unhappy if he could not find this considerable body of evidence to vouch for him. He must then go to the triple ordeal—three pounds instead of one pound of red-hot iron, or immersion of the arm in boiling water up to the elbow instead of a mere dip as far as the wrist. Again the modern mind is tempted to ask whether this was not a somewhat cumbrous farce of condemnation? There were other forms of ordeal: one celebrated kind—that of water—by which the accused was apparently ‘had both ways’, whether he sank or swam, is so inexplicable to us that it seems little better than a grim joke. Stephen² can account for it only by the ingenious suggestion that it was really a form of honourable *hara-kiri* for a man whose guilt was virtually prejudged. Similarly both Palgrave³ and Stubbs⁴ regard the ordeal as a mere ‘last chance’ for a doomed man. Yet who knows? It has been reserved, paradoxically, for the age of scepticism to discover the singular and unaccountable phenomena of so-called ‘auto-suggestion’.

¹ Rituals also commonly accompanied the ordeals: P. & M. ii. 598. For the form of the accusatory oath, see Stephen, *H.C.L.*, i. 79.

² *Op. cit.* i. 73. ³ *Eng. Comm.* ii. 177. ⁴ *Sel. Ch.* (9th ed.), 169.

Anybody who survived these accumulated tests had surely, one would have thought, established his innocence beyond cavil. But perhaps the most remarkable feature of all in the history of the ordeal is that towards the end of the twelfth century it was apparently considered to be not severe enough. At all events, the Assize of Northampton in 1176 increased the savage penalties of those who were convicted by the ordeal; they were to lose the right hand as well as one foot, and to abjure the realm within forty days. Still more remarkable is the provision that the murderer or other base felon, if he is accused by the country—*fama publica*, in the person of the lawful knights—is not by any means acquitted even though he survive the ordeal of water; he must still abjure the realm. It is difficult to resist the impression that the ordeal was found to be an increasingly unsatisfactory test, and that the felon had discovered some ingenious means of evading or manipulating it; and these factors may have been largely responsible for its abolition some forty years after the Assize of Northampton. However this may be, it is clear that accusation by the country was very nearly tantamount to conviction, and at the least was equivalent to sentence of banishment. At no stage in the whole complex procedure is there a hint of any presumption of innocence.

Although the original system of frankpledge seems to have died out some time during the thirteenth century, and although centralized discipline was constantly growing through the developing organization of sheriffs, constables, and the Justices in Eyre, the tendency throughout the twelfth and thirteenth centuries was to tighten up rather than to relax what we may call local self-disciplinary responsibility. This was undoubtedly the effect of the Assizes of Clarendon and Northampton, and of the Assize of Arms in 1181; but perhaps the policy reached its climax in 1285 with the Statute of Winchester. By that enactment the hundred was actually rendered liable to make good the damage caused by theft with violence unless the robber was apprehended within forty days—a somewhat drastic incentive

to vigilance and fresh pursuit. Apparently judicial interpretation improved upon the severity of the statute, holding that the members of the hundred, if they shirked their duty, were actually to be regarded as accessories to the crime.¹ The statute remained long in force, and was freely resorted to by the victims of robberies²—so freely that nearly five hundred years after its enactment we learn that it had an unexpected and a comic result. It occurred to ingenious persons that a collusive and undetected robbery was an admirable means of extracting money from their fellow-citizens: and this simple means of unjust enrichment apparently became so popular that in 1749 it was necessary to pass an Act³ providing that nobody should recover more than £200 from the hundred for robbery unless the crime were attested by two witnesses. It sounds like a *lex imperfecta*, for one would have thought that it still remained easy for four dishonest persons 'in buckram' to arrange a profitable robbery in the Falstaffian manner.

It is unnecessary to dwell upon the well-known fact that another form of accusation developed out of the Assize of Northampton—I mean the Grand Jury; but one aspect of it is very relevant to our present purpose. When the ordeal disappeared, as it did in the early thirteenth century, accusation became more than ever a form of quasi-condemnation. For battle, which was in some sort the substitute for ordeal, was of no avail when the accusation was 'by the country': the stoutest and most innocent suspect clearly could not challenge 'the country' to prove the charge upon their bodies. Compurgation, on the other hand, does not seem to have existed in criminal trials after the Conquest. The accused, after 1215, was therefore left with no real defence at all, not even a 'last chance'. It

¹ 'When a robbery is done, if the country will not pursue the malefactors, some of them are receivers or abettors': per Dyer J., *Anon.* (1577), 2 Leon. 12.

² See e.g. *Cooper v. Hundred of Basingstoke* (1702), 11 Mod. 8; *Witham v. Hill* (1759), 2 Wils. 92.

³ 22 Geo. II, c. 24.

was probably for this reason that the petty jury grew up as a body, not of judges, but of witnesses concerning the alleged facts. The Grand Jury remained and still remains an essentially accusatory body: it may to this day present an indictment of its own knowledge (though it never does) without the intervention of any prosecution or the examination of any witnesses: even when it has thrown out a bill, it seems that the same indictment can be presented to it at the same assize or sessions. In strict theory of English law, far from the accused being presumed innocent until proved guilty, every person who comes before a petty jury on indictment comes with at least *prima facie* evidence of guilt against him, just as every person who is committed for trial by justices has a *prima facie* case to answer. Mr. Justice Stephen states the position in his customary uncompromising manner: ¹

"The prisoner was looked upon from first to last in a totally different light from that in which we regard an accused person. In these days, when a man is to be tried, the jury are told that it is their first duty to regard him as being innocent until he is proved to be guilty, and that the proof of his guilt must be given step by step by the prosecution, till no reasonable doubt can remain upon the subject. This sentiment is both modern and, in my opinion, out of harmony with the original law of the country. No one can be brought to trial till a grand jury has upon oath pronounced him guilty, as the form of every indictment shows. "The jurors for our [Lord the King], upon their oaths, present that A, wilfully, feloniously, and of his malice aforethought, did kill and murder B." Why should a man be presumed to be innocent when at least twelve men have positively sworn to his guilt? In former days . . . the presentment of a grand jury went a long way towards a conviction, and a man who came before a petty jury under that prejudice was by no means in the same position as a man against whose innocence nothing at all was known. In nearly every one of the trials for the Popish Plot, and, indeed, in all the trials of that time, the sentiment continually displays itself, that the prisoner is half, or more than half, proved to be an enemy to the King, and that, in the struggle between the King and the suspected man, all advantages

¹ *Op. cit.* i. 397.

are to be secured to the King, whose safety is far more important to the public than the life of such a questionable person as the prisoner. A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted.'

It may be thought that the considerations which applied to accusation by the country were fundamentally altered when the accusation was made not by a responsible public body, but by a private individual. Doubtless in this case the preliminaries were different, and a somewhat heavier initial onus lay upon the prosecutor: he must make solemn denunciation no less than five times, and we gather from Bracton¹ that the accused had much scope for fencing by means of pleas and exceptions: we do not know with certainty how stringent these safeguards were, but we may assume without rashness that, unless they had been reasonably effectual, the temptation and the facility of making capital charges against one's enemies would have led to what Hobbes called 'the war of every man upon every man'. But even in the appeal of felony there is little evidence of a presumption of innocence; on the contrary, there are considerable elements of a presumption of guilt. Until the end of the thirteenth century, the appeal was invalid unless accompanied by fresh pursuit—the hue and cry; and it was not till 1278 that the Statute of Gloucester extended to a year and a day the period within which the appeal could be brought. Now hue and cry may not mean much more than suspicion and allegation, but it does involve a certain amount of social co-operation: it implies at least that the accuser must find some among his fellow-citizens who believe that he has a *prima facie* cause of complaint: it is some check on vexatious or hysterical accusation: and its result is that in a sense the suspect is being brought to book by the country, though certainly not in so definite a manner as when he is arraigned by the *legales homines* on behalf of the country.

But an even more distinct presumption of guilt exists

¹ F. 139 b: Woodbine's ed., ii. 386.

in the appeal of felony, for it is a settled principle from the earliest times that battle shall not be allowed at all if there is a violent *praesumptio hominis* against the appellee—if, to take Bracton's examples,¹ he is taken red-handed near his victim (in which case, indeed, he may be slain forth-with),² or is fleeing from the scene of bloodshed, or has admitted the crime in the presence of witnesses. In the celebrated case of *Ashford v. Thornton* (1818), 1 B. and Ald. 405, which, as everybody knows, was the occasion, so late as 1818, of the abolition of the appeal of felony, the decision turned largely upon this presumption of guilt; and inasmuch as the appellee had been acquitted by a petty jury of the murder with which the appellant charged him, it was held that there was no such presumption of guilt as to deprive the appellant of his right of battle. It is not clear what happened in medieval times if combat was refused on the ground of the appellee's almost certain guilt; but it seems probable that, the charge against him being now notorious, presentment by the country would inevitably follow. Bracton³ makes it clear that the appeal of felony was by no means a matter simply between accuser and accused; above the disputants was the overtopping interest of the King in his own peace. Therefore, if the appellor died, or made default, or retracted his accusation, or otherwise evaded the appeal, it did not follow that the accused was acquitted. The King could still proceed *ex officio suo*, as if the accused had been indicted. Indeed, Bracton goes much farther and states explicitly that the mere fact of the appeal raised, so far as the King was concerned, a presumption of guilt which stood firm until the contrary was proved: *semper stabit praesumptio propter appellum donec probetur contrarium*, and again, *procedat igitur rex ex officio suo et pro pace sua ad inquisitionem propter praesumptionem appelli*. The rule was no doubt considered necessary in order to prevent accusers from being bought off or otherwise circumvented.

¹ F. 137: Woodbine's ed., ii. 386.

² P. & M. ii. 578.

³ F. 142 b: Woodbine's ed., ii. 402. Cf. Holdsworth, *H.E.L.* ii. 256.

Such were the principal origins of criminal accusation: none of them, it will be conceded, springs from a disposition to 'think no evil': and when we bear them in mind, we shall not be surprised that the prisoner laboured under disabilities which shock our consciences to-day, and that he continued to labour under them until the times of our grandfathers and even of our fathers—indeed, until our own lifetimes, for it was not until the end of the nineteenth century that the prisoner obtained, amid the gravest doubts of many merciful and intelligent persons, the last privilege of giving evidence in his own behalf. These disabilities of the prisoner are so well known that they need only a brief reference. He was neither able to say anything on his own behalf, nor, in cases of felony (though it was otherwise with misdemeanours), to be represented by counsel. He had no access to books, no means of knowing the exact charge which was to be brought against him, the manner in which it was to be presented, nor the witnesses who would testify to it. The evidence given against him was subject to hardly any of the rules of relevancy and admissibility which have become settled in the nineteenth century. He was always in danger of being convicted on the mere confession of an accomplice, which was regarded as particularly damning evidence. His trial was extraordinarily summary, never extending beyond a day, and execution usually followed upon judgement with irreparable celerity. His inability to call sworn witnesses in capital cases was perhaps the most remarkable of these handicaps, and nothing shows more clearly the prejudice against the man who stood in conflict with the Crown; for the theory (though it was doubted) seems to have been that it was unseemly and smacked of insubordination that witnesses should be sworn against the Crown.¹ Even

¹ See 3 Inst. 79 (where Coke denies that there is authority for the rule); Hale, P.C. 264 (who takes the same view as Coke); 2 Hawk. P.C. 434, s. 29; *R. v. Hopestill Tilden* (1620), Cro. Car. 291. A practice of allowing unsworn witnesses to give evidence for the prisoner grew up before the rule was finally altered by statute.

complacent writers like Blackstone¹ could not regard the rule without indignation, and it could be justified only on the most sophistical grounds. Gilbert,² for example, by a triumph of casuistry, explains it thus: 'the reason seems to be because men think it an act of piety to save the life of a man, and therefore may stretch a little beyond their knowledge, and for that reason are not admitted to hurt their consciences by swearing.' A less polite way of expressing this principle would be that the Crown, in its prosecution of criminals, dared not run the risk of perjury on behalf of the prisoner: another example of the fact that as guardian of the public peace it could not afford to make any concessions to the suspect. Is it too cynical to add that as beneficiary of forfeited goods, it was equally little disposed to make such concessions?³

But the rule concerning witnesses for the defence was bound to go, and it disappeared at the beginning of the eighteenth century.⁴ Even so, its abandonment was sometimes held up, though perhaps by way of courteous compliment merely, as a signal evidence of royal mercy.⁵

I have not forgotten one slight advantage which the prisoner may be thought to have enjoyed. It may be said that at least he was not bound to criminate himself, that he could not be put to the unfair test of solemn oath as to his innocence. Neither could he; but the historical reason for the rule is somewhat disillusioning, and certainly did not arise from any tenderness towards the prisoner. On the contrary, it seems probable that the objection to defence by denial on oath was that it afforded too easy a means of exculpation. If, as Gilbert says, the prisoner's witnesses were likely to 'stretch a little beyond their knowledge', what could be expected of him whose neck was in peril? The truth is, as Wigmore has shown once for all, that the maxim *nemo tenetur prodere seipsum* originated, not in any idealistic principle of criminal justice, but in a

¹ 4 *Comm.* 358.

² *Evidence* (ed. 1759), 158.

³ For other explanations, see Stephen, *op. cit.* i. 350 ff.

⁴ 1 *Anne*, c. 9.

⁵ See Gilbert, *loc. cit.*

somewhat squalid wrangle between the secular and the ecclesiastical arms. It was in the courts Christian that the notorious *ex officio* oath was so freely used: already unpopular there, it was brought into further disrepute by the arbitrary use to which the Star Chamber put it: and when prisoners on indictment objected to being put to denial on oath, their protest was directed not against a violation of elementary justice, but against the employment of an ecclesiastical expedient in a jurisdiction where it was illegitimate. In the mere asking of criminating questions they do not seem to have felt anything unusual or unjust; they were, in fact, frequently pressed and even bullied by the Court with such questions;¹ and if they refused to answer, as they were entitled to do and frequently did, it needs little imagination to suppose that their silence went hard against them with the jury. As is well known, the modern compromise is the sensible one that if the prisoner chooses to give evidence, he may be asked criminating questions as to the very offence with which he is charged, but not as to other offences which have no relevance to it.²

In sum, then, we may conclude that four hundred years ago in all criminal trials of which we have any record, the dice were loaded heavily against the accused. The presumption of innocence was not only absent from, but antagonistic to, the whole system of penal procedure. How and why have we come to hold the contrary view so strongly that it is one of the most unquestioned axioms in the whole of our law?

I believe the true explanation does not lie in ethics. It lies in the profound change which has taken place in the

¹ For examples, see Wigmore, *The Privilege against Self-Crimination*, 15 Harvard L.R. at pp. 629 and 635, n. 2. The privilege had never applied to the preliminary investigation by Justices of the Peace: Holdsworth, *H.E.L.* ix. 200.

² Criminal Evidence Act, 1898. As to the history of the *ex officio* oath and the maxim, *nemo tenetur prodere seipsum*, see Wigmore, *The Privilege against Self-Crimination*, *loc. cit.*; Phipson, *Evidence* (7th ed.), 206; Stephen, *op. cit.*, i. 338, 374.

organization of society. Upon this point Fitzjames Stephen writes with that strong common sense which characterizes the whole of his great *History of the Criminal Law*:

'In the present day the rule that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences. The plea of not guilty puts everything in issue, and the prosecutor has to prove everything that he alleges from the very beginning. If it be asked why an accused person is presumed to be innocent, I think the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous. It is, however, a question of degree, varying according to time and place, how far this generosity can or ought to be carried. Particular cases may well be imagined in which guilt, instead of innocence, would be presumed. The mere fact that a man is present amongst mutineers or rebels would often be sufficient, even in our own days, to cost him his life if he could not prove that he was innocent.'¹

Only when society is emancipated from fear—only when it can rely, *in the main*, on its organized protective forces—dare it give suspected persons the benefit of the doubt. Anybody who has ever had experience of courts martial, even in times when *leges silent*, will testify that of all tribunals they are the most indulgent towards the accused. Why? Because any person with the least sense of fair play feels that the individual soldier, an insignificant cog in a great machine, is pitted against odds which entitle him to any reasonable advantage which can be granted him without jeopardizing the system of discipline. On the whole, this is the feeling in England to-day about the criminal. But let the delinquent show signs of defying and defeating the forces of law and order, and magnanimity will contract in proportion as fear expands. Some years ago there was an alarming outbreak in England of garrotting; the legislature, seconded by the judges,

¹ *Op. cit.* i. 354.

suppressed it only by a vigorous application of the 'cat', a disciplinary expedient which nobody nowadays likes or admires. At the present time (1931), there is a distressing 'wave' of blackmail: alarm is created, for we all have skeletons in our cupboards and our violent hatred of the blackmailer is due largely to our fear of him; he bears the deadliest weapon of all, the truth. Severe sentences for this offence are being pronounced—in one case amounting to penal servitude for life—and the most minatory warnings are being given from the Bench; but as even these stern measures are not entirely effectual, Judges have lately been asking for the old deterrent of the lash; and it seems possible that they will get it, if the cupboard-skeletons continue to execute their distressing *danse macabre*.

Not until the end of the seventeenth century did English society feel itself secure enough against the malefactor to mitigate the severities of his accusation and trial. The Revolution of 1688 settled those two great disturbers of the peace, the scope of constitutional monarchy and (in great measure at least) the problem of religious toleration. The country settled down to comparative tranquillity and prosperity; it had more time for setting its house in order, and increasingly it felt that it could 'afford to be generous' to its recalcitrants. From 1695 onwards, the most glaring disabilities of the accused were removed one by one, and the aggressiveness both of Bench and Bar towards him steadily diminished. It was no small factor in this process of improvement that the old form of treason trial gradually ceased out of the land, and the administration of justice was thus freed from the miasmas of politics and theology. Stephen¹ gave it as his opinion that from the middle of the eighteenth century to his own day there had been little substantial change in the nature of criminal trials. But there was one gradual change: the presumption of innocence had not fully developed until the nineteenth century was well advanced.

There was an excellent reason for this. While, as I have

¹ *Ibid.* 424.

said, lawlessness became progressively less formidable in the more settled social conditions after 1688, it must not be supposed that the protection of society was by any means scientific or complete. We are accustomed to be horrified by the fact that little more than a century ago, our law knew upwards of two hundred capital offences. It is indeed a horrifying fact; but an even more astonishing circumstance is that, despite all the ferocity of the criminal law, there were still so many golden opportunities for the ingenious criminal and still so many forms of wrongdoing which went quite unchecked. When reasonable and intelligent men opposed the reform of the criminal law, as many of them did in the early years of the nineteenth century, it was not because they were naturally cruel or uncharitable, but because they believed that the criminal law was still so imperfect, so sporadic, so riddled with loopholes, that no relaxation whatever could be made consistently with safety. This inadequacy of the criminal law was due to several causes. First, there was no effective police system. When Queen Victoria came to the throne, the medieval principle that 'the country' must police itself had not been dislodged: the only public protectors of the peace were the parish constable and the watchman. Lawlessness, especially highway robbery, was the more rampant because of the great inequalities of wealth and the miserable plight of the destitute. After nightfall in many places to take one's money in one's pocket was to take one's life in one's hands.¹ Society certainly could not 'afford to be generous' to highwaymen and footpads. A large class of 'Have-Nots' were, almost of necessity, the declared enemies of the 'Haves'; and the kind of life, not wholly fictitious, revealed by such artists as Fielding, Hogarth, and John Gay had not disappeared in the days of our grandfathers. Second, the absurd punctilios of the indictment allowed many guilty persons to escape. It is well known that the most trifling inaccuracy in a name or place was sufficient

¹ See Lord Bowen, 'The Victorian Period', *Select Essays in Anglo-American Legal History*, i, at p. 552.

to invalidate an indictment. Sir Harry Poland records¹—though I do not know to what case he refers—that in 1827 Buller J. quashed an inquisition for murder because it stated that the jurors *on their oath* presented, &c., whereas the wording should have been, *on their oaths*.² It was not until 1915³ that the indictment was disembarrassed of the last traces of mischievous verbiage and finally placed upon a basis of common sense. Third, while the law fiercely repressed such wrongs as it happened to forbid, there were a great many which it did not forbid at all. Many forms of fraud were beyond the reach of the law, and a really Artful Dodger could, if he took sufficient trouble about it, prey upon the simple with impunity. As late as 1891, a French notary, one Bellencontre, embezzled or misappropriated funds which had been entrusted to him, and absconded to England. Nineteen separate charges were maintainable against him under French criminal law. When it came to a question of his extradition, it was held that he had committed no offence known to English law. This anomaly moved Wills J. (*In re Bellencontre*, [1891] 2 Q.B. 141) to make the following acid observations:

‘I am reminded of a circumstance that was mentioned to me some time ago by a friend very well versed in the English Criminal Law. In the course of his studies he made out a list of the iniquitous things that could be done by that law without bringing the man under the provision of the common or statute law, and he had had it in his mind at one time to publish it, to show how defective the law was, but he forbore on grounds of public policy to call attention to what people might do without rendering themselves liable to punishment.’

Cave J. in the same case described the criminal law as ‘a thing of shreds and patches’.

So, I fear we must add, it still is; but the shreds have at least been sewn together and the patches have been so plentifully applied that the cloth no longer resembles a sieve. The nineteenth century set to work with a will to

¹ *A Century of Law Reform*, 62.

² For some remarkable examples from Hale, see Holdsworth, *H.E.L.* iii. 617.

³ Indictments Act, 1915.

fill up by legislation the lacunae of the criminal law. It did so unscientifically, spasmodically, but undoubtedly with energy. There are now no less than 331 indictable offences known to English law,¹ and so many non-indictable petty offences that I really have not the heart to attempt to count them. Dishonesty will probably always be the most prolific source of crime, and our statute law has resolutely striven to define and repress its many *nuances*. It can be said with substantial accuracy that it is now extremely difficult to commit any act which ordinary moral judgement would consider 'criminal', without being made answerable for it; it is even increasingly possible to be punishable for acts which are not in any moral sense prompted by the guilty mind. Indeed, the criminal law spreads its net so wide that any of us who succeed in passing through life without being legally declared sinners have some reason to consider ourselves on the way to being saints. It is true that the law cannot yet cope with *all* the devices and desires of dishonesty: the fraudulent financier can still find many ways of eluding it: but this is the inevitable result of the policy of English law, so much admired by many jurists, of scattering corporate personality with a prodigal hand.

It is unnecessary to remark that this extension of the criminal law has been accompanied by the organization and development of a professional police force, a Public Prosecutor's department, and a Criminal Investigation Department, until there are now some 57,000 police employed in England and Wales.

The second great cause which contributed to the establishment of the presumption of innocence was the building up of the law of evidence. It is perhaps not sufficiently realized, frequently though the fact is stated, how very modern are the principles of evidence, even those which we have come to regard as elementary. Of course some rudimentary doctrines of evidence have always existed in our law, for the manifest reason that

¹ See *ante*, p. 251.

some rules as to proof are an indispensable part of the machinery of any tribunal, however primitive. But if we look at any of the earliest treatises on evidence, from Gilbert to Starkie—the principal are those of Bathurst, Peake, MacNally (for Scots law), and Phillipps, ranging from 1759 to 1814—we realize that what these writers understood by 'evidence' was a somewhat fortuitous and irrational assemblage of *Nisi Prius* or 'practice' rules which had grown up on no consistent theory and were little more than tricks of the pleader's trade—how this or that document was to be proved, how many witnesses were required in this or that transaction, and so forth. The same impression is conveyed if we glance at any of the exiguous titles on 'Evidence' in the principal Abridgements. The rules of evidence, in short, were arbitrary, disconnected, and highly technical: they had developed on purely empirical lines: and it was doubtless for this reason that they excited such scorn in the minds of critics like Bentham. As late as 1794 we find Edmund Burke, in the trial of Warren Hastings, contemptuously denying that there is any such thing as a 'law of evidence'. 'As to rules of law and evidence, he did not know what they meant; . . . it was true, something had been written on the law of Evidence, but very general, very abstract and comprised in so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes.'¹ While, therefore, rules of evidence, in a purely formal sense, certainly did exist and were constantly accumulating, they were not a logical, coherent structure, and we cannot say that any 'jurisprudence' of them existed until the appearance of Starkie's patient lucubration in 1824. With much less genius, but with equally laudable intent, Starkie attempted to do for the rules of evidence what Littleton had done for the rules of feudal tenure.

¹ *Lords' Journal*, Feb. 25, 1794, cited Wigmore, *Select Essays in Anglo-American Legal History*, ii. 695, n. The scornful reference is doubtless to Gilbert's treatise, which is also roughly handled by Bentham.

The subsequent development in the nineteenth century was extraordinarily vigorous, especially in the criminal law. More than fifty Acts affecting evidence at one point or another were passed during the course of the century, and between the years 1872 and 1897 alone some twenty-six statutes dealt with the evidence of prisoners, and culminated in Halsbury's Act of 1898.¹ The Courts followed the same road *pari passu*. We cannot now be concerned with the whole scope of this momentous process, but must confine ourselves to its bearing upon the presumption which we are considering. A group of cases in the early nineteenth century emphasize and develop two essential doctrines—first, that the onus of proof lies upon him who makes a positive averment: and second, the general presumption of lawfulness.² It is clear that these two principles are very closely akin and, when applied to criminal jurisdiction, lead irresistibly to the presumption of innocence. It would be superfluous to examine all these cases, except to say that outstanding among them are *Williams v. East India Co.*, 3 East 192, in 1802, and *R. v. Twynning*, 2 B. and Ald. 386, in 1819. But that the whole doctrine of the presumption of innocence was still trembling in the balance as late as 1820 is shown, I think, by the interesting case of *R. v. Burdett*, 4 B. and Ald. 95, decided in that year. The circumstances were that a riot had taken place in Manchester and the military had fired on the crowd, causing several casualties. Sir Francis Burdett, a Leicestershire squire, immediately wrote an hysterical 'address to the electors of Westminster', bringing fierce charges of murderous tyranny against the Government and the military. A copy of the address came into the hands of one Brookes in Middlesex, being for-

¹ Poland, *op. cit.* 54.

² *Williams v. East India Co.* (1802), 3 East 192; *Bennett v. Clough* (1818), 1 B. and Ald. 461; *R. v. Twynning* (1819), 2 B. and Ald. 386; *Rodwell v. Redge* (1823), 1 C. and P. 220; *R. v. Hobson* (1823), 1 Lew. C.C. 261; *Sissons v. Dixon* (1826), 5 B. and C. 758; *R. v. Inhabitants of Harborne* (1835), 2 A. and E. 540.

warded to him, as appeared from directions on the envelope, by a certain Bickersteth at the request of Burdett. A criminal information was laid against Burdett in the county of Leicestershire. The defendant was found guilty, and an application was made for a new trial, on the ground, to put it briefly, that there could be no libel without publication, that the only evidence of publication was in Middlesex and that there was no evidence of publication in Leicestershire, where the information was laid. The circumstances in evidence were peculiar. The libel was written on August 22, and on that and the following day Burdett was seen in Leicestershire. But there was no actual evidence as to how the libel came into the hands of Bickersteth: it was delivered by him to Brookes in Middlesex on August 24, but there was nothing to show whether it had been sent or handed to him by Burdett in Leicestershire, or had been sent to him by post from Leicestershire to Middlesex. The envelope was open, and there was no evidence that it bore seal or post-mark. Of course the evidence of Bickersteth could have cleared up the whole matter, but for some reason which does not appear he was not called by either side.

It will be seen that the argument was purely technical and without merits. The submission was that there must be proof of actual publication in Leicestershire: but it is doubtful whether this contention, even if successful, would have prevailed to obtain a new trial, for the court seemed to be of opinion that the defendant might have been found guilty in Leicestershire of a libel which, though only begun in Leicestershire, was completed by publication in another county. But the interesting part of the case for present purposes is the discussion as to whether the circumstances which have been narrated were sufficient to raise a presumption of guilt against Burdett. The majority of the Court (Abbott C.J. and Best and Holroyd JJ.) were of opinion that they were sufficient: Bayley J. held the contrary. Many of the dicta express the judicial

feeling of the time concerning presumptions in criminal trials. Best J., who had originally tried the case, said:¹

‘It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord Mansfield, in the *Douglas* case, gives the reason for this. “As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.” In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the King. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, you presume the intent. It therefore appears to me quite absurd, to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our

¹ At p. 121.

present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall.'

Holroyd J. said:¹

'It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of England, as it was urged and admitted in the case of the Seven Bishops, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken of in the Seven Bishops' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused, and the well-being and security of society must depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. . . . It is established as a general rule of evidence, that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true.'

Abbott C.J. said:²

'No person is to be required to explain or contradict, until enough

¹ At p. 139.

² At p. 161.

has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?

Even Bayley J., who held that the facts as laid in the information were capable of several explanations not necessarily consistent with the commission of the crime in Leicestershire, said this:¹

‘No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one-half of the persons convicted of crimes are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so, in other criminal cases; but the question always is, whether there are sufficient premises to warrant the presumption.’

I have quoted these dicta at what may seem disproportionate length because they, and especially the strong observations of Best J., exhibit a judicial temper which I believe materially changed in the next half-century. At all events, in 1865, in the case of *Reg. v. White*, 4 F. & F. 363, we seem to observe a marked change of attitude. This was an indictment for scuttling a ship in fraud of the underwriters, and Martin B. in charging the jury said that ‘in order to enable them to return a verdict against the prisoner, they must be satisfied, beyond any reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit’. This is commonplace enough, and would not in itself excite remark; but the case is noteworthy because the learned reporters consider it as formulating simply

¹ At p. 149.

and clearly a rule which had previously been in doubt. Their general view is that the presumption of innocence was an ancient principle of our law, but that it had recently been brought into question by certain judges, and that this reaction resulted from the fact that a number of persons, whose guilt seemed probable almost to certainty, were escaping on capital charges owing to a pedantic view of the sufficiency of evidence against them. For reasons which have been stated, I doubt whether this view is historically correct; the real truth seems to be that the presumption of innocence had not previously been firmly established. However this may be, Foster and Finlason, no doubt reflecting the opinion of the profession, cast much doubt on the doctrines expressed by Abbott C.J. and Best J. in *R. v. Burdett*; and in particular they attack a view expressed at Nisi Prius by Pollock C.B. in two then recent cases¹ to the effect that a jury in a criminal case need only have 'that degree of certainty that you would act upon in your own grave and important concerns'. This doctrine, say the reporters, though Pollock C.B. claimed for it the support of Lord Tenterden, 'somewhat startled the profession', and they are clear that the *communis opinio doctorum* requires for a criminal conviction a greater degree of certainty than the Chief Baron indicates.

So far, then, as the definite establishment of a legal doctrine can be identified with any specific date—and this is never more than approximately possible—I think we may say that the presumption of innocence, as it is now understood, came to maturity about 1865. In the United States the climacteric of the doctrine was even later. In 1895 the doctrine became an issue of the first importance in *Coffin v. United States*, 156 U.S. 432. In that case the Supreme Court elaborately laid down what I may call the arch-heresy that the presumption of innocence is an 'instrument of proof'—i.e. a piece of actual, substantive evidence before the jury *proving* the accused's innocence until neutralized by contrary proof of the strictest kind.

¹ *R. v. Manners*, [1849] C.C.C.; *R. v. Muller*, [1865] C.C.C.

The doctrine was at once attacked by Thayer in the Storrs Lectures for 1896:¹ a long series of cases in different courts declined to follow it:² and we may say with little hesitation that its authority is no longer accepted. Whatever remained of it was finally demolished by Wigmore.³ Only two years after the decision in *Coffin's Case*, the Supreme Court was prepared to presume fraudulent intent from false accounts, and did not hesitate to say this: 'If a legitimate presumption is raised, so as to create a duty for the accused to produce some evidence to the contrary, and he does not do so, there is no reason why the jury may not be required to find according to the presumption.'⁴ This, it need hardly be said, is quite irreconcilable with the theory that the presumption of innocence is *evidence* of the accused's blamelessness. Indeed, by no intendment of law or logic can the presumption be actual, substantive evidence before the jury. The plain fact is that when a criminal trial begins, there is no evidence whatever before the jury. The trial is set in motion by a positive averment and until that averment is made out, the accused is not guilty; and the averment is not deemed in law to be made out until it is established beyond reasonable doubt. But when the averment is of admitted facts which according to all experience reek, if I may so express myself, of criminality, it is absurd to say that an onus of exculpation does not rest upon the accused or that there is any evidence of innocence standing in his favour. The force of the so-called presumption is therefore purely static, not dynamic. If such a thing as anticipatory, *ab ante* evidence were possible—which it is not—we should have to say that it is against the prisoner in any indictable offence rather than in his favour: for has not the Grand Jury declared that there is at least some evidence of his guilt? This was undoubtedly the original theory of our law, but I need hardly add that the theory has little reality in modern

¹ Reprinted as Appendix B of Thayer's *Evidence*.

² See Wigmore, *Evidence*, para. 2511, n. 3.

³ *Loc. cit.*

⁴ *Agnew v. U.S.A.* (1897), 165 U.S. 36.

practice. The Grand Jury has become merely a step in procedure, a picturesque survival the utility of which in the conditions of to-day may well be questioned—though I would not be understood to express contempt of picturesque survivals.

What, then, is the present scope and meaning of the maxim that a man is presumed to be innocent until he is proved guilty? Attention has often been called to the sophistries of which it is susceptible. Paley assaulted it from the point of view both of logic and of ethics.¹ 'When certain rules of adjudication must be pursued,' he wrote, 'when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested, courts of justice should not be deterred from the application of these rules, by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty.' I would again interject that this was written at a time when society was not yet able to cope effectually with its criminals and when probably far more crimes went undetected than were ever brought to justice. Paley adds the following remarkable sentiment, which I cannot think will command assent in many breasts: 'They ought rather to reflect, that he who falls by a mistaken sentence may be considered as falling for his country; whilst he suffers under the operation of these rules, by the general effect and tendency of which the welfare of the community is maintained and upheld.' It requires a superhuman effort of imagination to hear the innocent man murmuring on the gallows, *Dulce et decorum est pro patria mori*.

Wigmore² exposes two common fallacies to which the presumption is subject: one—the exploded doctrine that the presumption is substantive evidence—has been already mentioned; the other lies at the root of the whole conception. Is this 'presumption' really a presumption or rule of law at all? Is it not merely an alternative way of expressing the principle, indispensable to any system whatever of

¹ *Moral Philosophy*, Works, ii. 311.

² *Op. cit.*, para. 2511.

judicial proof, that positive averment creates an onus of demonstration?

It is clear that the doctrine may easily degenerate into rhetoric. We find, for example, so weighty a writer as Best,¹ in his classic treatise on Evidence, basing the doctrine on a still broader one, which he claims that 'the legislators and jurists of almost every age and country have recognized'—namely, that 'the protection of innocence' is 'the primary care of the law'. If the legislators and jurists of almost every age and country have believed this, they have pinned their faith to a transparent fallacy. The law may exist to protect a great many things, but it does not exist to protect innocence. Guilt means that the law has been broken, innocence means that it has not been broken; and there is no necessity for the law to 'protect' a person who has not infringed it: for against what is he protected? Who or what is attacking him for not having broken the law? Why need he be defended against imaginary aggression? When he is acquitted of a criminal charge, it is not a case of 'protecting', but of merely declaring, innocence. The compulsory sanctions of law exist in order to protect rights or impose duties, or both things together; and it is really necessary to remind ourselves sometimes that penal law exists in order to prevent disobedience, not to vindicate obedience. Law punishes lawlessness; seldom or never does it reward lawfulness.

Again, 'it is better that ten guilty persons should be acquitted than that one innocent person should be convicted'. As Stephen dryly observes,² it all depends on what the guilty persons have been doing. It also depends on the general social conditions in which they have been doing it. I have already called attention to the vague fluctuations in the proverbial ratio between the guilty and the innocent; and I have done so in no spirit of levity, for the ratio which it assumes is not without significance. I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million,

¹ *Evidence* (12th ed.), 34.

² *Op. cit.* i. 438.

guilty persons should escape than that one innocent person should suffer; but no sensible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos. In short, it is only when there is a reasonable and uniform probability of guilty persons being detected and convicted that we can allow humane doubt to prevail over security. But we must never forget that ideally the acquittal of ten guilty persons is exactly ten times as great a failure of *justice* as the conviction of one innocent person.

Again, 'in a civil case a preponderance of probabilities is sufficient, but in a criminal case the prisoner's guilt must be proved beyond all reasonable doubt'. This statement is constantly repeated in the text-books, but very little authority is cited for it, and it is difficult to know what real meaning is to be attached to it. Certainly it cannot mean that there is any substantive difference (except perhaps in certain offences where corroboration is required) between the methods of proof in civil and criminal cases, for it is laid down again and again that this is not the law.¹ Is there any true difference between a preponderance of probabilities and a *reasonable* certainty (the converse of reasonable doubt)? 'Probability' may mean different things. It is often loosely used to indicate mere conjecture or plausibility. Neither in civil nor in criminal cases is a jury entitled to consider an averment established by conjecture or plausibility. But 'probability' may also mean the utmost degree of certainty or conviction which, upon the evidence of circumstances, things and statements, can be attained by our limited powers of reasoning and observation.

¹ See e.g. 4 Bl. Comm. 356; Halsbury, *L. of E.*, ix, paras. 737, 750, 758; and Best J. in *R. v. Burdett*, *ante*, p. 280. There are, of course, important differences in the kind of evidence which is *admissible*, because it is felt that some kinds of relevant evidence which are admitted in civil cases would unfairly prejudice the accused in criminal cases (see per Lush J., *Hurst v. Evans*, [1917] 1 K.B. 352); but *on the evidence admitted*, the methods of demonstration and inference do not differ in the two cases.

That degree of certainty or conviction exists, or ought to exist, in the decision of any legal issue. It is difficult to see how men and women, called upon to weigh evidence either in civil or criminal matters, can bring to bear anything more than Pollock C.B. requires of them—i.e. 'that degree of certainty that you would act upon in your own grave and important concerns'; for indeed they have no other means of reasoning. The principle of 'reasonable doubt' therefore seems to be little more than a counsel of prudence; and there is considerable judicial authority for this view.¹ The warning is not so frequently uttered in civil cases, because the occasion is not so solemn; but does it follow that the same degree of care and certainty is not as necessary, or at least as desirable, in the one case as in the other? I apprehend that a judge who directed a jury in an action for damages, 'You need not be as careful in arriving at your conclusions as if you were trying a criminal case', would considerably startle the legal world and the public; and though there is a good reason for reminding juries of the necessity for caution in criminal cases, I know of no authority for the proposition that their duty is any less when property, and not life or liberty, is at stake.

Finally, it is noteworthy that the presumption of innocence, firmly established though it is, and salutary though it is within its proper limits, is not without important exceptions. Statutory offences involving little or no *mens rea* are common nowadays, and it would seem that in many of these cases the mere fact of non-compliance with a positive duty, which has been imposed by statute, raises a presumption of guilt. Thus in *Huggins v. Ward* (1873), L.R. 8 Q.B. 521, the duty in question was that of giving notice 'with all practicable speed' to the police of a contagious disease among animals.² It was held that the mere fact of possessing diseased animals was *prima facie* evidence of a breach of the statute, and the onus lay on the

¹ See Halsbury, *L. of E.* ix, para. 737, n. (f).

² Under the Contagious Diseases (Animals) Act, 1869.

defendant of proving that he had given notice. Similarly in *Over v. Harwood*, [1900] 1 Q.B. 803, it was held that evidence that a certificate of vaccination had not been received by the proper officer was prima facie evidence of breach of the statute which required the certificate—no doubt a rule essential to practical administrative convenience, but somewhat startling when we remember that there are a dozen ways in which a certificate which has been duly sent may be lost or mislaid. Cases like these can only mean that when a positive statutory provision has not been complied with, the person who is alleged to have broken it is deemed to be guilty until he has explained himself satisfactorily: and it seems a little paradoxical when the Court adds, in *Over v. Harwood*, that the burden of proving non-compliance rests on the prosecution.

Further, the law has been compelled to modify in some important respects the principle that a man is entitled to come before the jury with a clean sheet, whatever his previous conduct may have been. For example, the receiver of stolen goods is a criminal who is all the more dangerous because he is cowardly, and experience showed that under the Common Law he frequently escaped because of the difficulty of proving affirmatively his knowledge of the guilty origin of the booty.¹ In 1871, therefore, it was found necessary to enact² that on such a charge evidence may be given that stolen property has been found in the possession of the accused within the previous twelve months. A recent suspicious circumstance of this kind, it would be generally agreed, is not unfairly relevant to a charge of receiving; but the statute goes on to provide that evidence may also be given of a conviction for 'any offence involving fraud or dishonesty' within the previous five years. Though it is probably a highly expedient, this certainly is not a lenient provision, for there may easily be

¹ See e.g. *R. v. Oddy* (1851), 2 Den. 264.

² Prevention of Crimes Act, 1871, s. 19, re-enacted by Larceny Act, 1916, s. 43.

circumstances in which it is a far cry from a fraud committed five years ago, to a receiving of stolen goods to-day. An enactment of this kind shows, if I may return to a former point, that society cannot 'afford to be generous' to receivers, for society very well knows that this elusive type of criminal is an instigator and an organizer, on a large scale, of offences against property.

But perhaps the most conspicuous modification of the principle that the accused is not to be prejudiced by his previous misdeeds or evil reputation is the development of the doctrine relating to what is called 'system' or 'systematic course of conduct'. I do not think it is generally realized how much this doctrine has grown and how seriously it has eaten into the principle that 'conduct on other occasions' is inadmissible in evidence against a prisoner. So far as I can discover, the doctrine first made its appearance at the beginning of the nineteenth century, and it arose for a very good reason. At that time, if one may judge by the number of reported decisions upon the matter, there seems to have been something like an epidemic of forgery and uttering. Now, there is an easy defence to a charge of uttering false coin or bank-notes: the accused will almost certainly say that the money came into his possession innocently and that he had no notion that it was false; and it is extremely difficult to prove his guilty knowledge. A jury, however, will not be likely to regard it as a mere coincidence if it is shown that the accused has done the same thing on previous occasions. In 1801, in *R. v. Tattershall*, a case referred to in 2 Leach 984, but otherwise unreported, Chambre J. laid it down at *Nisi Prius* that evidence of previous uttering might be admitted against a person charged with that offence. Three years later, in *R. v. Whiley* (1804), 2 Leach 983, Chambre J. was confirmed in that view by the full Court of King's Bench, presided over by Lord Ellenborough. This decision was immediately followed in several cases,¹ though as late as

¹ *R. v. Hough* (1806), Russ. & Ry. 129; *R. v. Ball* (1807), Russ. & Ry. 132; and see *R. v. Millard* (1813), Russ. & Ry. 245.

1829¹ Bayley J. expressed doubts about it. It was soon extended to other offences; thus in *R. v. Hunt* (1820), 3 B. & Ald. 566, it was held that on a charge of sedition evidence might be given of previous seditious acts, utterances and preparations; and in *R. v. Voke* (1823), Russ. & Ry. 531, where on a charge of shooting evidence was admitted of a previous shooting at the same person, we hear the now familiar doctrine that evidence of previous similar conduct may be given in order to rebut the defence of accident. A turning-point was reached in 1849 with *R. v. Geering*, 18 L.J. M.C. 215, where it was held, on a charge of husband-poisoning, that evidence might be given of the deaths from poisoning of other members of the family whose food the prisoner had prepared. Since that date, the doctrine has undoubtedly extended its scope with rapidity and elasticity. For a long time, and even after the important decision of the Judicial Committee in *Makin v. At.-Gen. for New South Wales*, [1894] A.C. 57, it was sought to restrain the doctrine to the purpose either of rebutting a defence of accident or mistake or else of proving a particular intent which constituted an integral part of the offence; and as late as 1915, this limit is re-asserted by the King's Bench.² But there are many signs that of recent years this limitation has been gradually relaxed. Thus there has been an increasing number of cases in which evidence has been admitted of similar acts done not only before, but *after*, the offence charged;³ and this kind of evidence has been admitted in order to rebut a defence of alibi and mistaken identity⁴—a very different thing from a defence of 'accident or mistake'. On charges of sexual offences, there has been a tendency to admit evidence of similar previous acts committed some considerable time before, which could hardly be regarded

¹ *R. v. Phillips* (1829), 1 Lew. C.C. 105.

² *Perkins v. Jeffery*, [1915] 2 K.B. 702.

³ e.g. *R. v. Mason* (1914), 111 L.T. 336; *R. v. Olsson* (1915), 31 T.L.R. 559; *R. v. Armstrong*, [1922] 2 K.B. 555.

⁴ *Thompson v. R.*, [1918] A.C. 221.

as constituting a 'system';¹ and in the two most recent cases,² a very important extension has been made—viz. that evidence either of previous or of subsequent conduct may be given in order to negative a defence of 'innocent intent'. In the one case the question was whether the possession of arsenic, in the other the possession of instruments designed for purposes of abortion, was innocent. Plainly there are many circumstances in which to rebut a defence of 'innocent intention' differs little from simply rebutting a defence of 'not guilty'. Mistake, accident, innocent intention—if you can attack these by 'similar conduct', you have penetrated far into the prisoner's fortress, and indeed not very many defences are left to him. I think that the present state of the law on this subject amounts to something like this: You cannot give evidence of the prisoner's previous conduct merely to show that he is a person of bad character or criminal disposition. If, for example, he is charged with an offence of dishonesty, you cannot show that he has been previously dishonest in his dealings, in ways different from that with which he is now charged; for that is merely to show that there is some probability of his having committed the offence for which he is indicted.³ But—I do not think I state this too widely—if he has committed a number of criminal acts leading up to the act now charged against him, or even if he has persistently committed the very kind of guilty act with which he is now charged, then evidence of that guilty conduct may be given against him and it is idle to pretend that he comes before the jury with a presumption of innocence in his favour.

The difference between the two cases is one of degree, not of kind. In both, what is really sought to be proved is that the accused is likely to have committed this crime. But in the first case, the likelihood is not powerful enough

¹ *R. v. Shellaker*, [1914] 1 K.B. 414; *R. v. Hewitt* (1925), 19 Cr. App. R. 64.

² *R. v. Armstrong*, [1922] 2 K.B. 555; *R. v. Starkie*, [1922] 2 K.B. 275.

³ *R. v. Fisher*, [1910] 1 K.B. 149.

to counterbalance the unfair prejudice which it would raise against the prisoner; in the second case, it is, logically, so powerful that it suggests an inference of guilt, not conclusive, it is true, but highly persuasive unless the accused repels it.

Average common sense would probably agree that when a man repeatedly and systematically commits the very same sort of crime, it is decidedly in the interests of justice that the jury should know this fact. A man, for example, at least three times to the knowledge of the police goes through a form of marriage with a woman whose life he has insured, and three times in almost identically the same suspicious circumstances the woman is found drowned in her bath.¹ It would be the most mischievous pedantry to keep the jury in ignorance of such facts. But let us fully realize the implications of this doctrine of 'system'. Most habitual criminals work on a 'system'. It is a fact well known to criminologists and to the police that the criminal 'specializes' in one kind of crime and seldom departs from it. The poisoner always poisons, the stabber always stabs; the burglar does not pick pockets, the pickpocket does not burgle; more, the thief who breaks into houses does not commonly break into warehouses; and Criminal Investigation is considerably assisted by the fact that habitual malefactors are known by their distinctive methods and predilections. Admit 'system' against them, and it seems to me that you have taken away—and for my own part, I should add, rightly taken away—no small part of the presumption of innocence.

On the whole, then, historically and logically, we are led to a conclusion which has the sanction of that great master of evidence, Wigmore²—namely, that the presumption of innocence amounts to little more than a caution to the jury not to arrive at hasty inferences and a reminder that affirmative allegations must be proved by those who make them, not disproved by those against

¹ *R. v. G. F. Smith* (1915), 31 T.L.R. 617.

² *Op. cit.*, para. 2511.

whom they are made. 'My Lords,' said Lord Dunedin in *Thompson v. R.*, [1918] A.C. at p. 226, 'the law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner.' The presumption of innocence is merely one of the safeguards against handicapping the prisoner with undue prejudice, and in that aspect it is an indispensable and a beneficent part of the administration of criminal justice; but if allowed to become obscured by rhetoric and sentiment—which are very different things from humanity—it may be an obstacle to those principles which are 'best fitted to elicit the truth as to guilt' and, it need hardly be added, the truth as to innocence. The quality of mercy is not strained, but it may easily become strained by unreflective cliché.

I hope that nothing here written conveys the impression that the writer advocates or admires a spirit of vindictiveness towards the criminal; his effort has been only to see, if he can, this important principle of justice in its true perspective, and it seems to him to lie somewhere between the elevating impulse of compassion and the unlovely necessity of self-protection.

APPENDIX

INDICTABLE OFFENCES

Explanatory Note.—The figures following each offence refer to the Article in Stephen's *Digest of Criminal Law*, 7th ed., 1926. If the offence is not referred to in that work, the letter A., followed by page number, refers to Archbold's *Criminal Pleading, Evidence and Practice*, 27th ed., 1927. If the offence is referred to in neither of these works, the statute governing it is cited. The statutory authority for all other offences (when they are not purely Common Law crimes) may be found by reference to the relevant Articles or pages in Stephen or Archbold.

It sometimes happens that the same criminal act is both a felony and a misdemeanour. It seems best, for the sake of completeness, to treat these twofold crimes as constituting separate indictable offences. The prefixed letter *F* (for felony) or *M* (for misdemeanour) indicates the category of the crime.

There are certain indictable offences¹ which, if committed by a person above the age of sixteen,² may be dealt with summarily, with the consent of the accused.³ These are indicated by prefixing the letter *S*.

I. PRIVATE OFFENCES

1. WRONGS TO THE PERSON

1. Murder. 315 and 323 (see also 310 and 322).
2. Attempted murder. 325 (except *(i)*).
3. Sending letters threatening to murder. 326 (*a*).
4. Conspiracy or soliciting to commit murder. 326 (*b*) and (*c*).
5. Manslaughter. 315 and 324 (see also 310 and 322).
- F* 6. Shooting, wounding, &c., with intent to do grievous bodily harm, or to resist apprehension. 330 (*a*).

¹ All indictable offences, except homicide, if committed by a person under the age of sixteen, may be dealt with summarily: Summary Jurisdiction Act, 1879, ss. 10 & 11; Summary Jurisdiction Act, 1899, s. 2.

² Criminal Justice Act, 1925, s. 24.

- MS 7. Wounding or inflicting grievous bodily harm (with or without weapons). 335 (a).
8. Using chloroform, &c., to commit or assist in committing an indictable offence. 330 (e).
9. Burning, maiming, &c., by explosions. 330 (f).
10. Causing explosions or casting corrosive fluids with intent to do grievous bodily harm. 330 (g).
11. Placing, &c., explosives in or near ships or buildings with intent to do bodily harm. 331.
- F 12. Endangering life or causing harm by administering poison. 332.
- M 13. Administering poison with intent to injure or annoy. 335 (b).
14. Endangering railway passengers by placing, &c., anything on a railway, taking up rails, changing points or signals, &c. 330 (h).
15. *Ditto* by throwing anything at railway carriages. 330 (i).
16. *Doing anything with intent to obstruct, upset, &c., railway engines, carriages, &c.* 532 (h).¹
17. Attempting to choke, suffocate, &c., with intent to commit an indictable offence (garrotting). 330 (e).
18. Possessing, &c., fire-arms, ammunition, or explosives with intent to endanger life. 531 (in part).
19. Setting spring guns, &c., to injure trespassers. 335 (e).
20. Causing harm by furious driving. 336 (b).²
- S 21. Assault occasioning actual bodily harm. 343.
22. Assault with intent to commit felony or resist apprehension. 344 and 345 (a).
23. Unlawful detention, &c., or ill-treatment of lunatic or mentally defective. 380 (a), (b), (g), and (h); 381 (b), (e), (f), (g), and (h); 382 (a), (b), and (d).
24. Intimidation and molestation. 563 (d).
25. Cruelty to or neglect of children. 370 to 372.³
26. Neglecting to provide for an apprentice or servant. 335 (d) and 563 (c).

¹ See II. 12. 1, *infra*, as contrasted with which the three offences (14, 15, and 16) here specified are acts of *deliberate* and aggressive injury.

² Cf. II. 12. 15, *infra*.

³ The whole law with regard to the treatment of children may, of course, be regarded from the point of view of racial integrity (II. 4, *infra*), but where cruelty and neglect are concerned the wrong seems to consist chiefly in personal injury to those who are unable to defend themselves.

27. Rape. 350 to 352, 353 (*a*).
 S 28. Indecent assault on a female. 345 (*d*).¹
 29. Abduction of woman having an interest in property.
 364 (*a*) and (*b*).
 30. Abduction by force. 364 (*c*).
 31. Malicious use, manufacture, or possession of explosives.
 531 (in part), 532 (*b*), 533 (*e*) (in part), and 537.
 32. Illegally imprisoning subjects beyond the seas. 157.
 33. False imprisonment. A. 995.

2. WRONGS TO FAMILY RELATIONSHIPS

1. Stealing children under 14 (kidnapping). 368.²
 2. Abduction of girls under 16. 365.³

3. WRONGS TO PROPERTY

1. Sacrilege. 443 (in part).
 2. Burglary. 443 (in part).
 3. Housebreaking. 444 (in part).
 4. Breaking into shops, warehouses, &c. 444 (in part).
 5. Attempts to break into houses, shops, warehouses, &c. 68.
 6. Entering with intent to commit a felony. 445.
 7. Possession of housebreaking tools, &c. 446.
 8. Robbery and assault with intent to rob. 440.
 9. Extortion by threat to accuse of crime. 441 (2), (3), and
 (4) (second part).
 10. Extortion by other threats. 441 (1) and (4) (first and
 third parts).
 S 11. Larceny of horses, cattle, and sheep. 426 (*a*).
 S 12. Larceny from the person. 426 (*d*).
 S 13. Larceny in house to value of £5, or with menaces.
 416 (*c*).
 S 14. Larceny by a servant. 410, 417 to 420, 426 (*h*) (first
 part) and (*i*) (in part).
 S 15. Embezzlement. 410, 417 to 420, 426 (*h*) (second part)
 and (*i*) (in part), 559 (in part).

¹ As to offences 27 and 28, see p. 303 n., *infra*.

² There is also a form of false imprisonment technically known as 'kidnapping'—viz. stealing and carrying away a person from his own country to another. See A. 996, and cf. I. 1. 33, *supra*, and II. 16. 2, *infra*.

³ This has a sexual aspect, but in most cases its gravity consists in injury to family relationships.

- S 16. Larceny of post letters. 425 (c), (d), (e), and (f); 426 (k) and 427 (b).
- 17. Stealing will, codicil, &c. 425 (a) (in part).
- 18. Larceny by servants of the Bank of England. 425 (g).
- S 19. Stealing textile goods in process of manufacture. 426 (b).
- S 20. Stealing from ships, docks, wharves, wrecks, &c. 426 (e), (f), and (g).
- S 21. Simple larceny. 431 and 432.
- 22. Stealing titles to land or judicial or official documents. 428 (a), (b), and (c) (in part).
- S 23. Stealing, &c., fixtures. 428 (d).
- S 24. Tenant or lodger stealing goods or fixtures. 427 (a) and 429 (2).
- S 25. Stealing electricity. 428 (g).
- 26. Stealing coal, minerals, &c., from mine. 429 (1).
- S 27. Stealing a dog (second offence). 430.
- S 28. Stealing, &c., trees, shrubs, &c., to value of £1 in pleasure gardens, &c., or to value of £5 if elsewhere. 428 (e) (second part).
- 29. Stealing, &c., trees, shrubs, &c., to value of 1s. (third offence). 428 (f).
- S 30. Stealing, &c., growing plants, fruits, vegetables, &c. (second offence). 428 (f).
- S 31. Obtaining property by false pretences. 450 (1), 451 to 453.
- 32. Cheating at play, &c. 454.
- 33. Misappropriation under power of attorney or by agent, &c. 470 (i), (iii), and (iv).
- 34. Agent, &c., pledging or obtaining advances upon goods entrusted to him, and clerk assisting therein. 472.
- 35. Fraud by trustee. 471.
- 36. Fraud by director or officer of company or corporation. 470 (ii) and 473.
- 37. Falsifying accounts. 475 and 497.
- 38. Fraudulently inducing person to execute deed, &c. 450 (2).
- 39. Fraudulently destroying, &c., will, codicil, &c. 425 (b).
- 40. Fraudulently destroying, &c., titles to land, or [S] other valuable security, judicial or official document. 428 (a), (b), and (c) (in part), and 432.
- S 41. Obtaining credit by false pretences. 455.

42. Fraud in connexion with sale of land, &c. 456, 457, and 458.
43. Conspiracy to defraud or extort. 459.
44. Pretending to use witchcraft. 460.
45. Cheating. 461.
46. Fraudulently concealing ore. 463.
47. Personation to obtain property. 515.
48. Bank of England officer making out false dividend warrant. 498.
49. Fraudulent issue of seamen's orders. 559 (in part).
50. Fraud by moneylender. A. 694.
- S 51. Receiving stolen goods. 476 and 477.
52. Corruptly taking reward for restoring stolen property. 478.
53. Bankruptcy offences. 545 to 551.
54. Arson. 532 (a) (in part), 533 (a), (b), and (d) (in part), and 535 (b) (in part).
- S 55. Setting fire to crops, plantations, &c. 533 (c) and 535 (b) (in part).
56. Killing and maiming cattle. 533 (g).
57. Destroying ship. 532 (a) (in part), (i), (j), (k), (l); 533 (d) (in part), (e) (in part), and (f), and 535 (h).
- S 58. Destroying trees and shrubs to value of £5, or if in park, garden, &c., £1. 536 (a).
59. Destroying hop-binds. 533 (h).
60. Destroying trees or shrubs to value of 1s. (third offence). 538 (b).
61. Destroying growing plants, fruits, vegetables, &c. (second offence). 538 (c).
62. Sending letter threatening to burn or destroy property. 534.
63. Damaging goods in process of manufacture, machinery, &c. 532 (c).
64. Destroying works of harbours, docks, canals, &c. 532 (e).
65. Destroying agricultural or manufacturing implements, machinery, &c. 535 (a).
66. Flooding mines or damaging or destroying mines, mining machinery, ropes, &c. 535 (c) and (d).
67. Opening sluices, &c., or injuring, &c., river, canal, &c. 535 (f).
68. Destroying, &c., dam, &c., of mill, pond, &c. 535 (g).

- 69. Tenant demolishing or removing buildings, fixtures, &c. 538 (*a*).
- S 70. Injury to property generally. 538 (*h*).
- FS 71. Forgery and uttering (statutory). 485 to 489, 491 to 494, and 558 (in part).
- M 72. Forgery (statutory). 490 (*a*) and (*b*) and 495.
- 73. Forgery of trade-marks. 505 to 507.
- 74. Forgery at Common Law (i.e. of instruments not provided for by statute). 509.
- 75. Riotously demolishing buildings, machinery, &c. 102.
- 76. Riotously damaging buildings, machinery, &c. 103.
- 77. Corruption of or by agent. 474.
- 78. Piracy. 140 to 148.¹
- 79. Three persons armed in pursuit of game by night. 105.
- 80. Night poaching. 541.
- 81. Deer stealing. 542 (*a*) and (*b*).
- 82. Killing hares and rabbits by night in warren. 542 (*c*).
- 83. Fish poaching. 542 (*d*).
- 84. Dredging within limits of private oyster fishery. 435.
- 85. Director, &c., of company concealing name of creditor entitled to object to reduction of capital. (Companies Act, 1929, s. 60 (1).)
- 86. Director, &c., of company misrepresenting debt or claim of creditors of company. (Companies Act, 1929, s. 60 (2).)
- 87. Personating shareholder of a company. (Companies Act, 1929, s. 71.)
- 88. Falsification of share warrant (Scotland). (Companies Act, 1929, s. 72 (1).)
- 89. Engraving, &c., plate, &c., of share warrant (Scotland). (Companies Act, 1929, s. 72 (2).)
- 90. Falsification, &c., of books, &c., of company which is being wound up. (Companies Act, 1929, s. 272.)
- 91. Fraud by officer of a company which has gone into liquidation. (Companies Act, 1929, s. 273.)

¹ This is usually classed as an 'international' crime, but the phrase only means that the municipal courts of every civilized country will punish this extreme form of robbery wherever it be committed on the high seas and whatever be the nationality of the offender. This universal condemnation doubtless means that it is an offence 'by international law', but this does not alter the fact that it is a crime in English law, and it is here classified accordingly.

92. Wilful false statement in company return, &c. (Companies Act, 1929, s. 362.)
93. Taking motor vehicle without owner's consent. (Road Traffic Act, 1930, s. 28 (1) (b).)

II. PUBLIC OFFENCES

Acts injurious to

1. CONSTITUTIONAL GOVERNMENT

1. High treason. 70 to 80.
2. Treason felony. 81.
3. Misprision of treason. 225.
4. Incitement to sedition, &c., by alien. (Aliens Restriction (Amendment) Act, 1919, s. 3 (1).)
5. Assaulting or alarming the Sovereign. 82.
6. Contempt against the Sovereign. 83.
7. Solemnizing, &c., unlawful Royal Marriage. 84.
8. Unlawful petitioning. 109.
9. Seditious words and libels. 123 to 126.
10. Seditious conspiracy. 123 to 126.
11. Bribery of voters. 174 to 176, and 179 (in part).
12. Personation and other offences at elections. 177, 178, 179 (in part), 180 to 182, and 518.
13. Printing false copies of Private Act or Journals of Parliament or tendering such copies in evidence. 200.
14. Disobedience to a statute. 166.¹

¹ This offence is vague and is difficult to classify, but since it covers any defiance, not specifically a crime by any other rule of law, of the legislative sovereign in the State, it may be appropriately regarded as an act prejudicial to constitutional government. Stephen's statement is: 'Every one commits a misdemeanour who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the Legislature to provide some other penalty for such disobedience': *R. v. Wright* (1758), 1 Burr. 543; *R. v. Harris* (1791), 4 T.R. 202 (breach of quarantine regulations). Cf. Archbold, 4: 'Even though a statute does not use express terms describing the nature of the offence [i.e. designating it as either felony or misdemeanour], if it prohibits a matter of public grievance to the liberties and securities of the subject, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute are misdemeanours at Common Law, punishable by indictment, unless such

2. INTERNATIONAL RELATIONS

1. Violation of ambassador's privileges. 130.
2. Arrest of ambassador. 131 and 132.
3. Libel on foreign power. 133.
4. Interference in foreign hostilities. 134 to 137.
5. Equipping ship for illegally killing seals. (Seal Fisheries (North Pacific) Act, 1912, s. 3.)¹
6. Breach of law as to marriages of foreigners with British subjects. (Marriage with Foreigners Act, 1906, s. 2.)

3. DEFENCE SERVICES AND NATIONAL SECURITY

1. Inciting to mutiny. 85.
2. Disclosing official secrets, spying, &c. 87 to 93.
3. Building vessel of war without Admiralty licence, &c. (Treaties of Washington Act, 1922, ss. 1 & 2.)
4. Burning ship of war, arsenal, &c. 530.
5. Trading with enemy. (Trading with the Enemy Amendment Act, 1914, ss. 6 & 10; Trading with the Enemy Amendment Act, 1915, s. 3; Trading with the Enemy (Extension of Powers) Act, 1915; Trading with the Enemy Amendment Act, 1916; Trading with the Enemy and Export of Prohibited Goods Act, 1916, s. 2; Trading with the Enemy Amendment Act, 1918, s. 2.)
6. Illegal billeting. 160 (first part).
7. Assisting escape of prisoners of war. 217.
8. Shooting at naval or revenue vessels. 330 (b).

4. RACIAL INTEGRITY

(*Sexual Morality, Decency, Marriage, Self-preservation*).²

1. Infanticide. 327.
2. Abandoning children under two years. 374.
3. Administering or using drugs or using instruments to procure abortion. 330 (k) and (l).

method of procedure manifestly appears to be excluded by the statute.' See 2 Hawk. P.C., c. 25, s. 4, and *R. v. Hall*, [1891] 1 Q.B. 747.

¹ The main object of this Act is to enforce a convention between Great Britain, the United States of America, Japan, and Russia concerning the prohibition of pelagic sealing in certain parts of the Pacific.

² It seems best to consider the offences here assembled as falling under the

4. Child destruction. (Infant Life (Preservation) Act, 1929.)
5. Procuring drugs, &c. to cause abortion. 335 (c).
6. Concealment of birth. 328.
7. Unnatural offences. 240.
- S 8. Attempts to commit unnatural offences. 241, 276 (p)
(ii), 278 (in part), and 341.
9. Indecency with males. 244.
10. Carnal knowledge of female idiot or imbecile. 354 (3).
11. Carnal knowledge of female lunatic. 380 (last para.).
12. Carnal knowledge of female mentally defective. 356 (a).
13. Defilement of girl under 13. 353 (b), 354 (1), and 355.
14. Defilement of girl under 16. 354 (2).
15. Incest. 242 and 243.

general principle of the preservation of racial integrity. Sexual offences, though technically known as 'offences to the person', are repressed primarily because of their detrimental effect upon race. On no other grounds, for example, is it possible to explain the prohibition of unnatural offences, and of incest. It is difficult to draw the line between the public aspect of sexual offences and their violation of a fundamental right of personality; but in the cases of rape and indecent assault (I. 1. 27, 28, *supra*) it has seemed to me that the more serious aspect is the attack upon a right of personality, and I have therefore classified them as private offences. On the other hand, a crime like carnally knowing a young girl is not necessarily an offence 'of aggression', since the consent of the female is no defence; it is repressed because of its detrimental effect upon race. Public indecency, again, is in a sense an injury to public comfort, since it offends susceptibilities, but the susceptibilities which it offends are, in the last analysis, instincts of racial integrity. As for suicide (by which, of course, we mean attempted suicide), the desirability of treating it as a crime is highly questionable; but since it *is* a crime by English law, it can be accounted for only on one of three grounds—(a) as an offence against Divine law (see 4 Bl. *Comm.* 189; but apparently it was never a purely ecclesiastical offence); (b) as causing public alarm or horror; (c) as being injurious to race-survival. The first reason would hardly now be maintained as a legal doctrine. As to the second and third, it is difficult to say which is uppermost in the public mind. One suspects that the average man feels that an example should be made (if at all) of the *felo de se* because he has behaved in a shocking manner which is painful to others. But the waste of life is also an important consideration: thus Blackstone, *loc. cit.*, having emphasized the element of *sin*, observes that suicide is also a crime against the King 'who hath an interest in the preservation of all his subjects'. In early times he had a very practical interest in the preservation of the accused person whose property was about to be forfeited on conviction, and special rules therefore were necessary to ensure forfeiture of the suicide's land or goods; but this prosaic aspect of the matter had apparently been forgotten before the time of Staundforde—see Stephen, *H.C.L.* iii. 105. See Manson, 'Suicide as a Crime', *Journal of the Society of Comparative Legislation* (N.S.), i. 311. The whole subject of 'racial' offences is fruitfully discussed by Dr. Charles Mercier, *op. cit.*

INDICTABLE OFFENCES

16. Procuring women or girls for immoral purposes, or using drugs with like intent. 250.
17. Householder permitting defilement of girls. 251.
18. Detaining women in brothels. 367.
19. Conspiracy to defile a female. 252.
20. Person having custody, &c., of young girl causing, &c., her seduction, &c. 373.
21. Living on prostitute's earnings. 276 (*p*) (*i*), (*q*), and 278 (in part).
22. Procuration, abduction, &c., of female mentally defective. 356 (*b*) to (*e*).
23. Abduction of girls under 18 with intent to carnally know. 366.
24. Bigamy. 360 and 361.
25. Indecent exposure (public indecency). 246.
26. Keeping disorderly house. 257 to 263.
- S 27. Suicide (attempted). 68 and 319.
- S 28. Obscene publications. 247.
29. Fraudulently procuring child or young person to perform abroad for profit. 369; and see Children (Employment Abroad) Act, 1930.
30. Solemnizing matrimony without complying with legal requirements. 362 and 363.
31. Poor law officer procuring marriage of parent of bastard. 249 and 375.

5. REVENUE AND PUBLIC PROPERTY

1. Wounding officers employed in the prevention of smuggling. 330 (*c*).
2. Selling abroad wreck found in British waters. 559 (in part).
3. Taking marks from public stores. 464.
4. Concealing treasure trove. 465.
5. Personation in fraud of the Admiralty. 517.
6. Fraud to obtain police or fire-brigade pension. 198.
7. Fraudulent issue of money order by Post Office servant. 161 (first part).
- S 8. Fraudulently retaining, secreting, &c., postal packet or mail-bag. 434 (first part).
- S 9. Fraudulently printing, mutilating or reissuing stamps. 508.

- S 10. Fraudulent stamping, &c., of anchors and chain cables.
A. 725.
- S 11. Fraud by farmer in connexion with agricultural charges.
(Agricultural Credits Act, 1928, s. 11 (1).)
- 12. Coining and possession of instruments for coining. 521.
- 13. Clipping. 522, 523 (f), and 526 (d).
- S 14. Coining copper or foreign money. 523 (a) to (e).
- 15. Coining foreign copper money. 524.
- 16. Making or selling medals resembling coins. 527.
- S 17. Uttering or possessing counterfeit gold or silver coins with
intent to utter. 525.
- S 18. Uttering base copper or foreign coin. 526.
- 19. Assembling in order to smuggle. 104.
- 20. Injuring or destroying rate books. 502.
- 21. Non-compliance with regulations under Poor Law Act,
1927 (third offence). (Poor Law Act, 1927, s. 218
(2).)
- 22. False certificate as to existence, &c., of nominee for
government annuity. (Government Annuities Act,
1929, s. 32 (2).)
- 23. Personating nominee for Government annuity. (Govern-
ment Annuities Act, 1929, s. 34.)
- 24. Personating person entitled to receive government an-
nuity. (Government Annuities Act, 1929, s. 64.)
- 25. Destroying or injuring bridges. 532 (f) and (g).
- 26. Destroying turnpike gate, toll-house, &c. 538 (d).
- 27. Destroying telegraph lines, &c. 538 (e).
- 28. Destroying objects of art, antiquity, &c. 538 (f).

6. RELIGION AND PUBLIC WORSHIP

- 1. Obstructing, assaulting, or arresting upon civil process,
a clergyman performing service. 345 (e) and (f).
- 2. Heresy. 232.
- 3. Apostate denying truth of Christianity. 233.
- 4. Depraving the Lord's Supper. 234.
- 5. Depraving the Book of Common Prayer. 235.
- 6. Clergyman refusing to use the Book of Common Prayer.
236.
- 7. Disturbing public worship (brawling). 237.
- 8. Offences in relation to burial of corpses. 253.¹

¹ There seems little doubt that the basis of this group of offences is religious;

7. PUBLIC PEACE

1. Riot. 100.
2. Preventing reading of proclamation and rioting after proclamation. 101.
3. Unlawful assembly. 98.
4. Rout. 99.
5. Unlawful political meeting in Westminster. 108.
6. Sending challenge. 95.
7. Going armed so as to cause fear. 96.
8. Affray. 97.
9. Forcible entry and detainer. 107.
10. Unlawful drilling. 110.
11. Unlawful societies. 118 to 121.
12. Libel. 385 to 397. (S if by a newspaper.)¹
- S 13. Habitual drunkenness. 13.²
14. Blasphemy. 231.³

8. INDUSTRY⁴

1. Instigating, &c., an illegal strike or lock-out. (Trade Disputes Act, 1927, s. 1.)
2. Killing seals in close time. 559 (in part).
3. Conspiracy in restraint of trade. 560 to 562.
4. Offence against Truck Act. 564.
5. Failing to comply with provisions as to quota of British cinematograph films. (Cinematograph Films Act, 1927, s. 24.)
6. Offences arising out of the relation of employer and employee. A. 1283.

but *scilicet* some of them also involve the danger of the improper disposal of the corpses of persons who have died in suspicious circumstances. Cf. II. 9. 18, *infra*.

¹ The gravamen of the charge of criminal libel has always been that it was an act calculated to cause a breach of the peace—especially in times when men wore weapons and fought duels if insulted.

² See *ante*, p. 191, n. 1.

³ Since *Bowman v. Secular Society*, [1917] A.C. 406, it seems impossible to regard blasphemy as an offence against religion or theology; it is an act so provocative to the feelings of others that it is calculated to disturb the peace.

⁴ These were much more numerous formerly than at the present time: see Stephen, *H.C.L.*, ii. 207.

9. ADMINISTRATION OF JUSTICE

1. Assault on or obstruction of peace officer in execution of his duty. 345 (b).
2. Unlawful oaths. 115 to 117.
3. Judicial corruption. 163 (in part) and 136.
4. Embracery. 173.
5. Perjury and false statements. 190 to 197, 199, and 490 (c) (in part).
6. Voluntary escape (officer knowingly permitting prisoner to escape). 210.
7. Negligent escape (permitting liberation of prisoner through neglect or ignorance of law). 211.
8. Sheriff refusing to arrest, permitting escape, &c. 162 (a) and 212.
9. Rescue. 213 to 216.
10. Helping prisoner to escape. 218 and 219.
11. Escape by person in custody. 220.
12. Prison-breaking. 221.
13. Escaping from Pentonville or Parkhurst Prisons. 222.
14. Convict being at large before expiration of sentence. 224.
15. Uttering false certificate, &c., of Court records or delivering or acting under false process, &c. 499 and 500.
16. Maintenance, champerty, common barratry, &c. 202.
17. Obstructing, perverting, &c., the course of justice.¹ 203, 204, 223, and 553 (3).
18. Procuring cremation to conceal crime. A. 1348.
19. Misprision of felony. 226.
20. Agreement not to prosecute. 227.
21. Compounding penal action. 228.
22. Acknowledging recognizance, &c., in false name. 516.
23. Disobedience to lawful orders of Courts, officers, &c. 167.²

10. PUBLIC ADMINISTRATION

1. Assault on poor law officer. 345 (c) and Poor Law Act, 1930, s. 154.
2. Fraud by a public officer. 158.

¹ 'Justice' includes quasi-judicial jurisdiction, such as that of an arbitrator: *R. v. Freeman*, [1891] 1 Q.B. 360, though according to that case the offence in certain circumstances may be more properly described as a Common Law cheat (I. 3. 45, *supra*). On the same authority, if the wrongful act was intended to pervert the course of justice, it is unnecessary to prove (as in the case of a fraud upon an individual) that it has in fact done so.

² Stephen, 167: 'Everyone commits a misdemeanour who disobeys any order,

3. Causing disaffection among members of the police force, &c. 86.
4. Misapplying marks of public departments. 94.
5. Extortion and oppression by public officer. 156, 162 (*b*) (in part), and 163 (in part).
6. Neglect of official duty. 159 and 376.
7. Refusal to serve an office. 165.
8. Excise officer dealing in dutiable goods, &c. 164.
9. Officer of Board of Control having interest in institutions under Board. (Mental Deficiency Act, 1913, s. 24.)
10. Corruption of public officer. 170.
11. Corruption of public body. 172.
12. Selling office. 160 (second part), 162 (*b*) (in part), and 183 to 185.
13. Making interest for office for reward. 160 (second part), 162 (*b*) (in part), and 183 to 185.
14. Officer giving false certificate. 201.
15. Damaging or falsifying register of births, deaths, and marriages, or giving false certificate. 501 (in part).
- S 16. Post Office servant opening or delaying letters. 161 (second part).
- S 17. Unlawfully opening or impeding letters. 434 (second part).
- S 18. Post Office servant disclosing, intercepting, &c. telegrams, &c. 161 (third and fourth parts).
19. Telegraph company's servant divulging purport of telegrams. 161 (third and fourth parts).
20. Disclosing particulars of individual Census of Production return. (Census of Production Act, 1906, s. 6.)
21. Establishing wireless telegraph station, &c., without licence. (Wireless Telegraphy Act, 1904, s. 2 (3).)
22. Not attending, or obstructing, inquiry under Poor Law Act, 1927. (Poor Law Act, 1927, s. 223 (4).)
23. Non-observance of formalities with regard to detention of lunatics. 380 (*c*), (*d*), (*e*), and (*f*), and 381 (*a*), (*c*), and (*d*).
24. Obstructing officer of Board of Control (of mentally defectives). 382 (*c*).

warrant, or command duly made, issued, or given by any court, officer, or person acting in any public capacity and duly authorized in that behalf, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience': *Jones's Case* (1840), 2 Moo. 171; *R. v. Dale* (1852), D. & P. 37.

25. Obstructing petroleum inspector. (Petroleum (Consolidation) Act, 1928, s. 16.)
- S 26. Forgery of passport. 490 (c) (in part).¹

II. PUBLIC HEALTH

1. Unqualified person treating any person for venereal disease, &c. 268.
2. Offence against Dangerous Drugs Acts, 1920-23. (Dangerous Drugs Act, 1920, s. 13; Dangerous Drugs Act, 1923, s. 2.)

12. PUBLIC SAFETY, CONVENIENCE, AND COMFORT

1. Endangering railway passengers by unlawful acts, or by omission or neglect, or by drunkenness. 336 (a) and (c).
2. Sending an unseaworthy ship to sea. 55.
3. Endangering life on shipboard by breach of duty. 557.
4. Obstructing railway engine, &c., by unlawful act, or wilful omission or neglect. 538 (g).
5. Destroying sea-walls, river-banks, &c., or removing materials securing, &c. the same. 532 (d) and 535 (e).
6. Cutting, &c. electric lines. 536 (b).
7. Injuring post letter boxes or their contents, &c. 273 (1).
8. Common nuisance. 255, 256, 266, 267, and 269 to 272.
9. Disorderly inn. 265.
10. Sending prohibited articles by post. 248 and 273 (2).

¹ An offence difficult to classify. It is now a statutory misdemeanour (Criminal Justice Act, 1925, s. 36), but before it was made so, the King's Bench decided in *R. v. Brailsford*, [1905] 2 K.B. 730 (see *ante*, p. 246) that *the conspiracy to commit the act* was criminal and also (apparently *obiter*) that the act itself was a Common Law misdemeanour. The criminality of the act was thus described in the indictment: 'in fraud [of the Foreign Office regulations for the issue of passports], to the injury and prejudice and disturbance of the lawful, free and customary intercourse between the subjects of the King and those of the Czar of Russia, to the public mischief of the subjects of the King, and to the endangerment of the continuance of the peaceful relations between the King and the Czar and their subjects respectively and against our Sovereign Lord', &c. A heinous and 'multiform' crime! The decision of the case rests upon the ground simply that the conspiracy tended 'to produce a public mischief'. The act may certainly be considered to have an international aspect, and might perhaps be placed under heading II. 2 above; but on the whole it seems simplest to regard it as an act which is prejudicial to a public service—i.e. the supervision of aliens entering the country.

INDICTABLE OFFENCES

11. Criminal breach of contract (with regard to an essential public utility service). 563 (*a*) and (*b*).
12. Manufacture, sale, or possession of prohibited weapons. 111.
13. Not giving notice of cargo of petroleum spirit. (Petroleum (Consolidation) Act, 1928, s. 8.)
14. Act involving public mischief. 230.¹
15. Reckless or dangerous driving. (Road Traffic Act, 1930, s. 11 (1) (*b*).)
16. Motor racing, &c. on highways. (Road Traffic Act, 1930, s. 13 (1).)
17. Driving motor vehicle when under influence of drink or drugs. (Road Traffic Act, 1930, s. 15 (1) (*b*).)

13. SHIPPING²

1. Destroying, &c., lightships, buoys, &c. 535 (*i*).
2. Riotously preventing the sailing, &c. of ships. 106.
3. Maintaining false lights on shore. 559 (in part).
4. Using ship's certificate for another ship. 553 (1).
5. Infringement of collision regulations. 558 (7).
6. Concealing British character of ship. 553 (2).
7. Being on board ship without permission before seamen leave. (Merchant Shipping Act, 1894, s. 218.)
8. Leaving seamen behind, &c. 555.
9. Payment for apprenticing to sea fishing. 559 (in part).
10. Destroying, mutilating, or falsifying log-book. 559 (in part).
11. Assault on persons endeavouring to preserve wreck. 342.

14. THRIFT³

1. Street betting (third offence). 264.
2. Inciting infants to bet or to borrow money. A. 1338 f.

¹ See *ante*, pp. 244 ff.

² Shipping, although the property therein is for the most part private and not public, may be regarded as an essential public service for any nation, and especially for an island nation: and as a whole group of offences arise in connexion with it, it seems convenient to assemble them under a separate heading. The offences II. 13. 1-11, however, relate principally to the proper and seamanlike conduct of shipping; those which, though acts done on or in respect of ships, primarily threaten property, or the safety of the person or of the public, are placed under other appropriate heads: see I. 3. 49; I. 3. 57; I. 3. 64; I. 3. 78; II. 2. 5; II. 3. 3; II. 3. 4; II. 3. 8; II. 5. 2; II. 5. 10; II. 12. 2; II. 12. 3; II. 16. 3-5.

³ The ethics of gambling are so controversial that different reasons may be

3. Offences by moneylenders. (Moneylenders Act, 1927, ss. 5 & 16.)

15. HONOURS AND DIGNITIES

1. Bribery to procure grant of honours. 186.

16. HUMANITARIAN INSTINCTS¹

1. Slave trading. 149 to 153.²
2. Kidnapping Pacific Islanders. 154.
3. Impeding the saving of life from shipwreck. 330 (j).
4. Master of ship not waiting to save life in collision. 556 (in part).
5. Master of ship failing to render assistance to persons in danger at sea. 556 (in part).

given for the legal prohibition of certain forms of gaming and wagering; but the basic reason seems to be economic—i.e. the injury to the economic foundation of wealth caused by the attempt to acquire, without labour or production, the fruits of labour and production.

¹ These instincts or impulses, which are certainly recognized and encouraged by the law, though not usually commanded or enforced by it, are, it is submitted, primarily in question in the offences collected under this head.

² This, like piracy, is often described as an offence *iure gentium*; but the observations made with regard to piracy (*ante*, p. 300, n. 1) also apply here.

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